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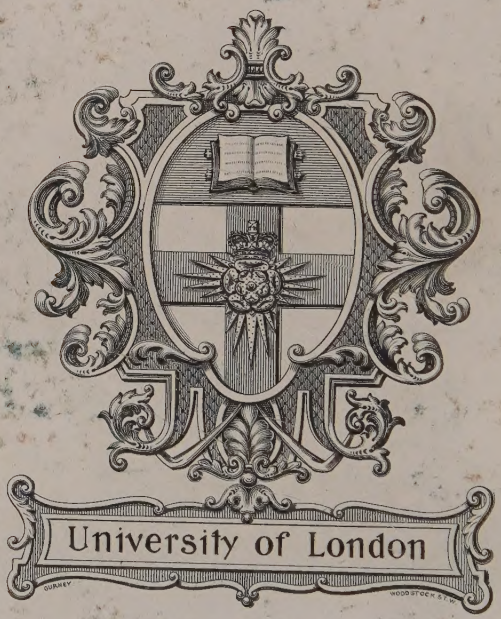
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1901—1902.

[IN THE COURT OF APPEAL.]

C. A.
1901
Oct. 30.

JENNINGS *v.* MATHER.
GRAY, CLAIMANT.

Bankruptcy—Interpleader—Execution Creditor — Property held on Trust—Trustee for Benefit of Creditors—Right of Indemnity out of Trust Estate—Lien passing to Trustee in Bankruptcy—Burden of Proof—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44.

The trustee under a creditors' deed was empowered by the deed to carry on a business for the benefit of the creditors. In so doing he incurred debts, for which he was personally liable. Judgment having been obtained against him for one of these debts, goods which were assets of the business were taken in execution under that judgment. The trustee having become bankrupt, these goods were claimed by his trustee in bankruptcy, and an interpleader issue was directed to try the title to them. Upon the trial of the issue no evidence was given as to the state of the

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account as between the bankrupt and the trust estate under the creditors' deed, and whether or not the bankrupt was in default to the estate:—

Held, affirming the judgment of a Divisional Court, that, the bankrupt being entitled to an indemnity out of the trust estate under the creditors' deed against liabilities incurred by him in carrying out the trusts of the deed, he had primâ facie a right to a lien on the goods, which passed to his trustee in bankruptcy, and therefore the claimant was entitled to succeed on the issue as against the execution creditor, who had no right to have goods held by the execution debtor upon trust taken in execution.

APPEAL from the judgment of a Divisional Court (Lawrance and Kennedy JJ.) upon an appeal from the decision of a county court judge upon an interpleader issue. (1)

Messrs. Smales Brothers & Co., who were carrying on a business at Bradford, executed a deed of assignment, by which they assigned all their trade assets to one Mather as a trustee for the benefit of their creditors. By the terms of the deed Mather was to carry on the business, and apply the profits (inter alia) to paying to the creditors 15*s*. in the pound upon their respective debts, and subject to this for the benefit of Smales Brothers & Co. Mather incurred debts in carrying on the business, among which was a debt to one Jennings in respect of goods supplied by him. Jennings, being unable to obtain payment of his debt, sued Mather, and recovered judgment against him for it. Execution was issued upon that judgment, under which the sheriff seized certain of the trade assets. Mather having absconded, and been adjudicated a bankrupt, one Gray was appointed trustee in bankruptcy of his estate. Gray then claimed the goods taken in execution. The sheriff interpleaded, and by consent the goods were sold and the proceeds paid into court, and an interpleader issue was ordered to be tried in the county court, in which the claimant was the plaintiff and the execution creditor was the defendant, to determine the title to the goods. No evidence was given at the trial of the interpleader issue as to the state of the account as between the bankrupt and the trust estate under the creditors' deed, and whether or not the bankrupt was in default to the estate. The county court judge gave judgment for the defendant on the ground that the goods seized, being held by

(1) [1901] 1 K. B. 108.

Mather on trust, did not pass to the claimant as his trustee in bankruptcy. The Divisional Court reversed his decision on the ground that the bankrupt had a lien on the goods by way of indemnity against liabilities incurred by him as trustee, which lien passed to his trustee in bankruptcy as part of his estate, and that therefore the claimant was entitled to succeed on the interpleader issue as against the execution creditor, who was not entitled to have goods held by the execution debtor on trust taken in execution.

Muir Mackenzie, for the execution creditor. The onus of proof upon the interpleader issue lies upon the claimant. He is not entitled to succeed merely because the execution creditor has no title. He must prove an affirmative title in himself, and, unless he does so, as against him the goods must be presumed to have been rightfully taken in execution: *Richards* v. *Jenkins*. (1) It may be admitted that the goods being held by Mather on a trust could not be rightfully taken in execution on a judgment against him: see *Dowse* v. *Gorton* (2) and *In re Evans* (3); but that does not avail the claimant, unless he shews that he has a title to them. Upon the evidence given at the trial of the interpleader issue, there was nothing to shew whether Mather was entitled to a lien on these goods by way of indemnity or not. It is clear that he would only be entitled to be recouped out of the trust property to such amount as, upon the account between himself and the trust property, might be due to him by way of indemnity. If he were in default in respect of sums with which he was not entitled to debit the trust estate to an amount equal to, or exceeding, any amount in respect of which he was entitled to indemnity, then there would be no lien: *In re Johnson*. (4) Mather had absconded; and no evidence was given as to the state of the account as between him and the trust estate. It is perfectly consistent therefore with the evidence that no lien existed. The onus of shewing that such a lien existed was upon the claimant.

(1) (1887) 18 Q. B. D. 451.
(2) [1891] A. C. 190.
(3) (1887) 34 Ch. D. 597.
(4) (1880) 15 Ch. D. 548.

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J. G. Wood (*Carrington* with him), for the claimant. It is clear that a trustee, who has properly incurred expenses or liabilities in connection with the trust, has a right to an indemnity in the nature of a lien on the trust property. Mather would therefore be entitled to an indemnity in respect of debts properly incurred by him in carrying on the business under the creditors' deed of which he was trustee: *In re Johnson.* (1) It is also clear that goods which were assets of the business carried on under the deed were goods held by Mather on trust, and formed part of the trust estate: *Dowse* v. *Gorton.* (2) Mather was therefore primâ facie entitled to a lien on the goods which were taken in execution. Such a lien would form part of his estate, and pass to his trustee in bankruptcy. On the other hand it is perfectly clear, and indeed it is not disputed, that the seizure of the goods in execution was wrongful, and that the execution creditor therefore has no title whatever to the goods. It is submitted that under these circumstances the onus which rests upon the claimant is sufficiently satisfied as against the execution creditor by shewing that Mather was entitled primâ facie to a lien on the goods. Assuming that it would be open to the execution creditor to answer the case so made for the claimant, by setting up some default on Mather's part, it would be for him to prove that there had been such a default, and not for the claimant to shew that there had not. No such default was suggested upon the trial of the interpleader issue, and it is too late to raise that point now. A point cannot be raised in the Court of Appeal for the first time, which, if it had been taken at the trial, might have been met by evidence: *Ex parte Firth, In re Cowburn.* (3) It would really be impossible to go into the account as between Mather and the trust estate upon the interpleader issue in the absence of the persons interested in the trust estate. [He also cited *Carvalho* v. *Burn.* (4)]

COLLINS M.R. In this case the question arises upon an interpleader issue between the trustee in bankruptcy of one

(1) 15 Ch. D. 548.
(2) [1891] A. C. 190.
(3) (1882) 19 Ch. D. 419, at p. 425.
(4) (1833) 4 B. & Ad. 382.

Mather and a creditor of the bankrupt, named Jennings, who had obtained a judgment against the bankrupt, upon which the goods in dispute were taken in execution.

Mather was the trustee under a deed of assignment, made by Smales Brothers & Co., for the benefit of their creditors. As such trustee he had, in dealing with the trust estate, incurred personal liabilities, among which was the debt due to the execution creditor. Having incurred these debts as a trustee in dealing with the trust estate, he would have a right as against the trust estate to indemnity in respect of the personal liabilities so incurred by him. That right would of course be accompanied by a collateral obligation to make good to the estate any amount which he might wrongfully have withdrawn from it, or to which he might be in default in his dealings with it. Goods which formed part of the trust estate under the deed clearly were not liable to be taken in execution upon a judgment for a debt due from him personally. The execution creditor, Jennings, having obtained judgment against Mather for a debt due from him, was only entitled to have taken in execution on that judgment goods of which Mather was the beneficial owner, and not goods which, like those in question, were only his subject to a trust. The claimant, no doubt, as Mather's trustee in bankruptcy, is not entitled to claim that the goods taken in execution passed to him as property of the bankrupt; but he claims to stand in the bankrupt's shoes with regard to any lien he may have on the trust estate, and says that, as against the execution creditor, he is entitled to have the goods remain available for the purposes of the indemnity to which the bankrupt was primâ facie entitled. It is clear, as I have pointed out, that the execution creditor has in truth no title whatever to these goods; but it is in effect contended that we are bound under the circumstances to consider, for the purposes of the interpleader issue, that he had a right to have these goods taken in execution. I do not, however, see how the wrongful seizure of the goods in execution can displace the equitable right, which Mather, as trustee, primâ facie, had with regard to the trust estate by way of indemnity against the personal liabilities incurred by him in fulfilling his trust. It is

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not, I think, for the claimant to begin by proving a negative, namely, that Mather had not been guilty of any default which did away with his right to indemnity. The claimant shews that primâ facie Mather had a right to a lien on the goods; and, assuming that the execution creditor, who has in truth no title to the goods, could be heard in the matter, which I doubt, it is, as it appears to me, for him to shew by way of answer that the primâ facie right of Mather has been done away with by his default. For these reasons, and those given by Kennedy J. in his excellent judgment in the Divisional Court, I think that the decision of that Court was correct, and that this appeal should be dismissed.

STIRLING L.J. I am of the same opinion. I think that Kennedy J. has accurately defined the legal position of the parties in this case; and the law, as stated by him, has really not been disputed in this Court. The Divisional Court held that the bankrupt, Mather, as trustee under the deed of assignment for the benefit of creditors, had an equitable right to indemnity out of the trust property, which passed to his trustee in bankruptcy, and which ought to be enforced as against the execution creditor, under whose judgment the goods in question were taken in execution. I think that in coming to that conclusion the Divisional Court were right. A trustee has for his protection a right to have costs and expenses properly incurred by him in the administration of the trust paid out of the trust property, and the amount of such costs and expenses constitutes a first charge upon that property. A Court of Equity will never take trust property out of the hands of a trustee without seeing that such costs and expenses are reimbursed to him, and that he is relieved from personal liability in respect of them; and, when the legal title to trust property is vested in the trustee, he has a right to resort to that property, without the assistance of the Court, for the purpose of indemnity against liabilities properly incurred by him in the administration of the trust. It is most important that this right should be maintained. A trustee is prohibited by law from making any profit for himself out of the trust

estate, a rule which is enforced with great stringency; it is only just that, on the other hand, he should be legally protected against all liabilities properly incurred by him in the administration of the trust estate. This was not disputed by the counsel for the execution creditor, but what he contended was that there was no evidence in this case that this right of indemnity was available to the claimant. He said in substance that, for aught that appeared, it might turn out that Mather had misappropriated trust funds to an amount which would deprive him of any claim to a lien by way of indemnity on the goods taken in execution. This contention gives rise to a question of evidence with regard to which the matter appears to stand thus. It is clear that Mather, in his capacity of trustee under the creditors' deed, incurred personal liabilities to the execution creditor and others, in respect of which primâ facie his right to indemnity out of the trust estate exists. It seems to me that, if that primâ facie right is to be rebutted, as it may be, by shewing that he was in default to the trust estate to an extent which wiped out his claim to indemnity, the onus of proving that to be so must, in the circumstances of a case like this, rest upon those who assert the existence of such a default. That question cannot really be properly gone into in the absence of the new trustee, whom I understand to have been appointed in the place of Mather. In the circumstances it appears to me that the execution creditor, who has no title whatever to the goods, should not be allowed to sweep away part of the trust fund which the claimant is entitled to have retained intact for the protection of the bankrupt's estate against the personal liabilities incurred by the bankrupt in the administration of his trust.

MATHEW L.J. I am of the same opinion. When Mather was appointed trustee under the deed of assignment for the benefit of creditors, he was protected by the law in the performance of his duties in two ways. In the first place, the trust property was protected from execution in respect of any debt contracted by the trustee. It would be obviously impossible that the execution creditor should be entitled to have property which

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was vested in Mather upon the trusts of the deed taken in execution for a debt for which Mather was personally liable. In the second place, Mather as trustee was entitled to protection against any personal liabilities properly incurred by him in the performance of his duties. He was placed in a position in which he might properly incur personal liabilities in carrying out the trust reposed in him, and the law gives to him a right to indemnity in respect of such liabilities out of the trust estate, assuming that it is sufficient for that purpose. What happened after the execution of the deed for the benefit of creditors was this. Mather, after acting for some time as trustee under the deed, became bankrupt, and absconded. In the meantime one Jennings had obtained a judgment against Mather for a debt incurred by him in carrying on the business under the deed, and proceeded to issue execution. That execution was not directed against Mather's own goods, as it should have been, but against goods forming part of the trust property under the deed—that is to say, goods in which the creditors of Smales Brothers & Co. were really the persons beneficially interested. It is unquestionable that the seizure of these goods in execution was altogether wrongful. The trustee in bankruptcy of Mather subsequently made a claim to the goods seized, as having been wrongfully taken in execution. An interpleader issue was ordered, to try the right to the goods as between the claimant and the execution creditor. The facts are not really in dispute, nor is the law on the subject. The execution creditor took up this position: he said that, although it must be admitted that his own execution was wholly wrongful, and that the goods seized were vested in Mather upon a trust, yet the trustee in bankruptcy could not claim the goods, because goods vested in Mather upon a trust did not pass to his trustee in bankruptcy. The county court judge gave judgment in favour of the execution creditor, and the claimant thereupon appealed from his decision to the Divisional Court. The Divisional Court reversed the decision of the county court judge, and against their judgment the execution creditor appeals to this Court. The position originally taken up by the execution

creditor left out of sight altogether the right of Mather as a trustee to indemnity out of the trust property, and to hold the goods seized as part of such property until his rights in respect of them are ascertained. That right appears to me clearly to exist, and to form a part of Mather's estate which passed to the claimant as his trustee in bankruptcy. It is impossible at this stage to take an account as between Mather and the trust estate. I think the claimant is entitled to say that such an account cannot be gone into now, but must be taken hereafter in due course, and that, in the meantime, it is sufficient, in order to entitle him to succeed on the interpleader issue as against the execution creditor, who has no title whatever to the goods, that there is primâ facie this equitable lien on the goods in favour of Mather's estate which has passed to him as Mather's trustee in bankruptcy. For these reasons, and those which have been so clearly stated by Kennedy J. in the Divisional Court, I think that the judgment of that Court was right and should be affirmed.

Appeal dismissed.

Solicitors for claimant: *Wrensted & Hind, for Scott & Holmes, Bradford.*

Solicitor for execution creditor: *G. R. Stubbs, for Gaunt, Hines & Bottomley, Bradford.*

E. L.

JONES *v.* HUMPHREYS.

1901
Nov. 11.

Assignment of Debt—Indefinite Amount—Right of Assignee to Sue—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

By an assignment in writing K., in consideration of an advance, assigned to the plaintiff "so much and such part of my income, salary, and other emoluments from H." (the defendant, in whose employment he then was) "as shall be necessary and requisite for payment to you of the sum of 22*l.* 10*s.*, or of any further or other sums in which I may hereafter become indebted to you." In an action by the plaintiff as assignee to recover two months' salary due from the defendant to the assignor, who in turn was alleged to be then indebted to the plaintiff in a larger amount:—

Held, that the assignment, not being of a definite and ascertained amount, was not such an assignment as was contemplated by s. 25, sub-s. 6, of the Judicature Act, and that the plaintiff could not maintain the action in his own name.

Quære, whether an assignment of an ascertained part of a debt is within the section.

APPEAL from Judge Lumley Smith, sitting at the Westminster County Court.

The plaintiff, Julius Jones, was a money-lender, and the defendant was a schoolmaster. One James Kerr was in the defendant's employment as an assistant schoolmaster.

On May 24, 1900, Kerr borrowed from the plaintiff a sum of 15*l.*, and signed the following document: "In consideration of the sum of 15*l.* this day advanced by you to me, I do hereby assign, sell, and transfer to you the said Julius Jones so much and such part of my income, salary, and other emoluments from Leonard Humphreys, of 101, Windsor Road, Forest Gate, proprietor of the Commercial College, Forest Gate, and from the East Ham School Board, or from any other person whose employ I may hereafter enter, or from any other source whatsoever to which I am or may at any time hereafter become entitled as shall be necessary and requisite for payment to you of the sum of 22*l.* 10*s.*, or of any further or other sums in which I may at any time hereafter become indebted to you, to have, hold, receive, and take the same for your own use absolutely. Dated this 24th of May, 1900. (Signed) James Kerr."

At that date Kerr's salary from the defendant was 2*l.* 12*s.* 6*d.* a week. In October his salary was raised to 2*l.* 15*s.*

On October 30, 1900, the plaintiff gave notice to the defendant of the assignment, and claimed to be entitled to Kerr's salary until the sum of 28*l.*, which was then due to him from Kerr, had been paid. The defendant disregarded the notice, and paid to Kerr subsequently his salary for November and December, amounting to 17*l.* 5*s.* The plaintiff then brought this action in his own name as assignee of Kerr's salary, Kerr not being a party to the action. The county court judge held that under the assignment of May 24 the defendant could not without taking the accounts between Kerr and the plaintiff know for certain how much he ought to pay to the plaintiff and how much to Kerr; that the assignment, not being of a definite and ascertained amount, was not "an absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 6, of the Judicature Act; and that the plaintiff consequently could not sue in his own name.

The plaintiff appealed.

Bray, K.C., and *Montague Lush*, for the plaintiff. The document sued on constituted a good equitable assignment, and if Kerr had been made a party to the action there could have been no objection. The fact that the salary which Kerr purported to assign was not due at the date of the assignment is immaterial. An assignment of future debts may be good: *Tailby* v. *Official Receiver* (1); and probably it is so even though the source from which those debts may become payable is undefined. (1) But even if it be a bad equitable assignment in so far as it refers to the income derivable from "any other source whatsoever," the good part of the assignment is severable from the bad: *Clements* v. *Matthews* (2); *Coombe* v. *Carter*. (3) Secondly, the plaintiff is entitled to sue in his own name. The assignment is "an absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 6, of the Judicature Act. That it is an assignment of only a part

(1) (1888) 13 App. Cas. 523. (2) (1883) 11 Q. B. D. 808.
(3) (1887) 36 Ch. D. 348.

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of the debt due from the defendant to Kerr and not of the whole debt is no objection: per Lord Coleridge C.J., *Brice* v. *Bannister*. (1) The ground upon which the county court judge held that the assignment was not within the section was that it was not of a definite sum, the amount of the debt from Kerr to the plaintiff which it was to satisfy being undefined. But to the extent of 22*l*. 10*s*. it is definite in amount, and, as stated above, the subject-matter of the assignment is divisible, and the good part may be severed from the bad.

Mallinson, for the defendant. The section requires an "absolute assignment," but a document purporting to assign future debts is not in reality an assignment at all. "A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and then when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment": per Jessel M.R., *Collyer* v. *Isaacs*. (2) A so-called assignment of future debts has not "any greater operation than as an agreement for value to assign those future debts when they come into existence": per Lord Fitzgerald, *Tailby* v. *Official Receiver*. (3) In *Tailby's Case* (4) the question whether the document there before the House was an assignment within the Judicature Act did not arise. In *Brice* v. *Bannister* (1) the point that the right plaintiff was not before the Court was not taken when the case was before Lord Coleridge, and the Court of Appeal decided the case upon other grounds. Moreover, the correctness of Lord Coleridge's decision in *Brice* v. *Bannister* (1) has been questioned: *Durham Brothers* v. *Robertson*. (5) It is doubtful whether an assignment of part of a debt, however well defined that part may be, can be regarded as coming within s. 25: *Durham Brothers* v. *Robertson* (5); *Mercantile Bank of London* v. *Evans*. (6) Secondly, the amount assigned is here indefinite.

(1) (1878) 3 Q. B. D. 569.
(2) (1881) 19 Ch. D. 342, at p. 351.
(3) 13 App. Cas. at p. 537.
(4) 13 App. Cas. 523.
(5) [1898] 1 Q. B. 765.
(6) [1899] 2 Q. B. 613.

The contention that it is defined to the extent of 22*l.* 10*s.* is ill-founded. It is not an assignment of at least that sum in any event; for non constat that the debt from Kerr to the plaintiff might not have been reduced below that sum by payment before the assignment was sought to be enforced, in which case the assignment would be effectual only for the reduced amount. It is in substance nothing more than a charge.

Montague Lush, in reply. The point that the section is confined to assignments of existing debts was taken in *Walker* v. *Bradford Old Bank* (1) and decided adversely to the defendant. [He also referred to *Comfort* v. *Betts*. (2)]

LORD ALVERSTONE C.J. I am of opinion that the judgment of the county court judge in this case must be affirmed. I think there is no doubt that an absolute assignment of future debts may be a good assignment for the purposes of the section; and I also think that an absolute assignment of a definite sum out of a future debt may possibly be within the section. But I think that an assignment of an undefined portion of future debts will not come within it. To satisfy the section you must be able to find in the document an intention to assign some definite sum, so that the debtor may know how much he is justified in paying to the assignee. It was contended by Mr. Bray that to the extent of 22*l.* 10*s.* of the salary coming to Kerr after May 24 the document did purport to assign a definite sum. But I am of opinion that that is not so. The document is expressed to assign so much of Kerr's future salary "as shall be necessary and requisite for payment to you of the sum of 22*l.* 10*s.*, or of any further or other sums in which I may at any time hereafter become indebted to you." Looking at the document as a whole, I think that it contemplates that the 22*l.* 10*s.* may not only be increased by further borrowing, but may also be reduced by payment, and that it means that the plaintiff is to be at liberty to apply Kerr's future salary to the satisfaction of his indebtedness to the plaintiff, whatever the amount of that indebtedness may happen to be. That being so, the document is not an absolute assignment of any

(1) (1884) 12 Q. B. D. 511. (2) [1891] 1 Q. B. 737.

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definite sum, but is a mere security purporting to be by way of charge. Whether, if the amount of Kerr's debt to the plaintiff had been defined, the fact that the document assigned only a portion of the salary coming from the defendant, and not the whole of it, was sufficient to prevent it from being an absolute assignment within the meaning of the section, I express no opinion.

DARLING J. I am of the same opinion. This was not an assignment of any ascertained sum. The sum which Kerr owed to the plaintiff at the time when the assignment was to take effect might be only a part of what the defendant owed to Kerr, or it might be more. It is impossible to say how much was assigned. But even if the sum had been ascertained, I think, having regard to the expression of opinion by Chitty L.J. in *Durham Brothers* v. *Robertson* (1), it is extremely doubtful whether the assignment, being of part of a debt only, would come within the Act.

CHANNELL J. I agree. This is not an assignment of the entirety of a debt, nor of an ascertained part of a debt. I do not think it necessary to decide the point which was left open in *Durham Brothers* v. *Robertson* (1), as to whether the assignment of part of a debt can come within the section. Here the assignment is of an unascertained part, and that, in my opinion, is not enough.

Appeal dismissed.

Solicitors for appellant: *R. Raphael & Co.*
Solicitors for respondent: *Emanuel & Simmonds.*

(1) [1898] 1 Q. B. 765.

J. F. C.

[IN THE COURT OF APPEAL.]

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Oct. 28, 29;
Nov. 13.

WARREN *v.* BROWN.

Ancient Lights—Prescription — Light — Extraordinary Purposes—Ordinary Purposes—Purposes requiring Special Quantity of Light—Measure of Right.

In considering the question of the right to relief for interference with ancient lights, there is no rule of law that the owner or tenant of the house is entitled only to so much light as may come up to some imaginary standard or measure as to what the house may ordinarily require for purposes of habitation or business. The question is essentially one of comparison—whether by reason of the deprivation of light the house is substantially less comfortable than it was before, having regard to the ordinary uses by way of habitation or business to which the house has been put or may reasonably be supposed to be capable of being put.

Certain trade premises contained ancient lights to which the flow of light was full and uninterrupted. During the latter part only of the statutory period of twenty years before action, and at the time the action was brought, the premises were used by the plaintiffs for a trade requiring an exceptional quantity and quality of light. The defendant erected a building which substantially interfered with the light coming to the plaintiffs' windows, and so darkened the premises as to leave an amount of light sufficient only for purposes of ordinary habitation or business, and materially insufficient for the special requirements of the plaintiffs' present trade:—

Held, reversing Wright J., [1900] 2 Q. B. 722, that, as the plaintiffs' ancient lights had been substantially interfered with by the defendant's building, and the user of the plaintiffs' premises for the purpose of a special business requiring much light was not unreasonable, the plaintiffs were entitled to damages for the interference.

The law stated by the Court of Appeal in *Kelk* v. *Pearson*, (1871) L. R. 6 Ch. 809, as to the right to relief for substantial interference with ancient lights, approved of and followed.

Lanfranchi v. *Mackenzie*, (1867) L. R. 4 Eq. 421, and *Dickinson* v. *Harbottle*, (1873) 28 L. T. (N.S.) 186, overruled.

APPEAL by the plaintiffs from the decision of Wright J. (1)

Hugo Young, *K.C.*, and *W. H. Stevenson*, for the plaintiffs. When (as the learned judge has held here) there is a substantial diminution of the light which the plaintiff has enjoyed for

(1) [1900] 2 Q. B. 722.

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twenty years, he has a good cause of action and is entitled to damages, even though he has not used the light for twenty years for the special purpose for which he is now using it, and for which he requires it. *Martin* v. *Goble* (1), on which the defendant may rely, and to which the learned judge referred, has been in effect overruled: *Moore* v. *Hall* (2); *Courtauld* v. *Legh* (3); *Dent* v. *Auction Mart Co.* (4) As Mellor J. said in *Moore* v. *Hall* (5), the actual mode of occupation of the dominant tenement is not the test: "It seems to me that the owner of the dominant tenement is entitled to all the light that has been accustomed to come through the particular aperture or window without challenge on the part of the owner of the servient tenement." And in the same case (6) Cockburn C.J. said: "I quite concur in thinking that *Martin* v. *Goble* (1) was wrongly decided. The matter, in my opinion, to be considered is, whether there is any diminution of light for any purpose for which the dominant tenement may be reasonably considered available." To the same effect is *Parker* v. *Smith.* (7) Of course the diminution of light must be a substantial one to give a right of action. The plaintiffs do not claim a special right to light by reason of the carrying on of a particular business; but they have acquired the right by user for twenty years, and they do not lose that right because they have carried on a particular business during part only of that period. The right to the access of light is a matter affecting the value of property, and if the light is diminished to such an extent as substantially to reduce the value of the dominant tenement the owner or occupier of that tenement has a good cause of action.

In *Yates* v. *Jack* (8) Lord Cranworth L.C. held that "the owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously to the interruption sought to be

(1) (1808) 1 Camp. 320.
(2) (1878) 3 Q. B. D. 178.
(3) (1869) L. R. 4 Ex. 126.
(4) (1866) L. R. 2 Eq. 238.
(5) 3 Q. B. D. at p. 180.
(6) 3 Q. B. D. at p. 182.
(7) (1832) 5 C. & P. 438; 38 R. R. 828.
(8) (1866) L. R. 1 Ch. 295.

restrained." That case shews that *Clarke* v. *Clark* (1), *Durell* v. *Pritchard* (2), and *Robson* v. *Whittingham* (3) cannot be taken to be good law, except so far as they lay down that the Court will not interfere unless there be a substantial diminution of light. In *Martin* v. *Headon* (4) Kindersley V.-C. (5) referred to *Yates* v. *Jack* (6) and *Dent* v. *Auction Mart Co.* (7) as shewing that "it is no answer to the plaintiff's case to tell him that it is still possible for him to carry on his business, for that many persons carry on the business of a tailor with a less quantity of light than that which still remains available for the plaintiff's workshop." In *Dent* v. *Auction Mart Co.* (7) Wood V.-C. (8) referred to the summing-up of Best C.J. in *Back* v. *Stacey* (9) as laying down the law correctly. *Lanfranchi* v. *Mackenzie* (10) was founded on *Martin* v. *Goble.* (11) In *Lazarus* v. *Artistic Photographic Co.* (12) Kekewich J. declined to follow *Lanfranchi* v. *Mackenzie* (10) but followed his own previous decision in *Attorney-General* v. *Queen Anne's Mansions* (13), holding that a man is entitled to the light which he has enjoyed for twenty years, although he has not used it during the whole of that period for the special purpose for which he is using it at the time of an interference. In *Dickinson* v. *Harbottle* (14) Malins V.-C. adhered to his own decision in *Lanfranchi* v. *Mackenzie.* (10)

[*Warmington, K.C.*, for the defendant, said he was not going to contend that the actual user of the premises limited the right with reference to light.]

The learned judge has put a wrong construction on the language of James L.J. in *Kelk* v. *Pearson.* (15) The Lord Justice could not have meant to say that if you take away from a man a substantial part of his existing right to light, it is enough to tell him he has a sufficient amount of light according

(1) (1865) L. R. 1 Ch. 16.
(2) (1865) L. R. 1 Ch. 244.
(3) (1866) L. R. 1 Ch. 442.
(4) (1866) L. R. 2 Eq. 425.
(5) L. R. 2 Eq. at p. 433.
(6) L. R. 1 Ch. 295.
(7) L. R. 2 Eq. 238.
(8) L. R. 2 Eq. at p. 245.
(9) (1826) 2 C. & P. 465, 466; 31 R. R. 679.
(10) L. R. 4 Eq. 421, 427.
(11) 1 Camp. 320.
(12) [1897] 2 Ch. 215.
(13) (1889) 5 Times L. R. 430.
(14) 28 L. T. (N.S.) 186.
(15) L. R. 6 Ch. 809, 811.

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to the ordinary notions of mankind. Mellish L.J. there puts it clearly that the real question is "whether by reason of deprivation of light the house is substantially less comfortable than it was before." Nothing is said in the judgments as to considering the particular purpose for which the light may be required. In *Ecclesiastical Commissioners for England* v. *Kino* (1) and *City of London Brewery Co.* v. *Tennant* (2) James L.J. explains his judgment in *Kelk* v. *Pearson* (3) by stating that what he said in the latter case was, in effect, only a repetition of the ruling of Best C.J. in *Back* v. *Stacey* (4), which ruling was adopted not only by Wood V.-C. in *Dent* v. *Auction Mart Co.* (5), as already observed, but also by Brett and Cotton L.JJ. in *Ecclesiastical Commissioners for England* v. *Kino*. (6) Moreover, in *City of London Brewery Co.* v. *Tennant* (7) Lord Selborne expresses his "complete adherence to the view of the law taken in *Kelk* v. *Pearson*." (3) *Leech* v. *Schweder* (8) is to the same effect. So that the now well-established rule in *Back* v. *Stacey* (9) carries the plaintiffs here the whole way.

[LORD ALVERSTONE C.J. The authorities seem to come to this—that if there is a substantial diminution of light there is a right of action, but not if there is only a trifling diminution.]

That is so. *Scott* v. *Pape* (10), in which the Court of Appeal held that the prescriptive right to light was a right to a substantial part of the light which has come to the dominant tenement for the statutory period, does not seem to have been present to the mind of Wright J. That right is an absolute, indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used: *Cooper* v. *Straker* (11); *Aynsley* v. *Glover* (12); *Martin* v. *Price* (13);

(1) (1880) 14 Ch. D. 213, 220.
(2) (1873) L. R. 9 Ch. 212, 216.
(3) L. R. 6 Ch. 809.
(4) 2 C. & P. 465; 31 R. R. 679.
(5) L. R. 2 Eq. 238.
(6) 14 Ch. D. 213, 223-9.
(7) L. R. 9 Ch. at p. 218.
(8) (1874) L. R. 9 Ch. 463, 472-3.
(9) 2 C. & P. 465, 466; 31 R. R. 679.
(10) (1886) 31 Ch. D. 554, 568, 569, 571.
(11) (1888) 40 Ch. D. 21, 27.
(12) (1874) 18 Eq. 544; affirmed (1875) L. R. 10 Ch. 283.
(13) [1894] 1 Ch. 276, 285.

Calcraft v. *Thompson* (1); *Clifford* v. *Holt*. (2) The question is whether the obstruction has caused substantial or material injury, having regard to the purposes to which the premises are applied or likely to be applied: *Adamson* v. *Gatty*. (3) No arbitrary standard can be fixed. Here Wright J. has found in favour of the plaintiffs (1.) that the light now left is not sufficient for the trade they are carrying on; (2.) that for over twenty years the premises were suitable for that trade, which is a common trade in the district; and (3.) that for over twenty years the plaintiffs had required more than ordinary light. On all these grounds the plaintiffs are entitled to relief.

Warmington, K.C., and *A. Neilson*, for the defendant. The interference, as found by the learned judge, is with an extraordinary amount of light said to be required for modern and delicate machines, and he has held, and rightly, that a claim to such an amount of light cannot be sustained, for it goes beyond what is laid down by the authorities. The rule, as laid down by Best C.J. in *Back* v. *Stacey* (4) and recognised in subsequent cases, is that to sustain a right of action there must be a substantial deprivation of light sufficient to render the house substantially less comfortable and enjoyable. The plaintiff cannot succeed under that rule if he can only shew that the premises are interfered with as regards light coming to a novel and delicate machine which may require more than an ordinary amount of light.

[ROMER L.J. In *Back* v. *Stacey* (4) the point did not really arise. The business there was a grocer's business, for which only ordinary light was wanted. Suppose a man has five ancient windows and the light to one of them is entirely obstructed, can he be told that he has no right of action because the other four are sufficient for all ordinary purposes of inhabitancy or business?]

Probably not: it is for the jury to say what is the standard in the particular case.

[LORD ALVERSTONE C.J. Suppose the house has been used for diamond-cutting for twenty years, and is then used

(1) (1867) 15 W. R. 387.
(2) [1899] 1 Ch. 698.
(3) W. N. (1870) 184.
(4) 2 C. & P. 465; 31 R. R. 679.

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for twenty years for some other purpose not requiring so much light, what is the standard?]

In that case the standard should be the user of the premises for twenty years immediately preceding action brought.

The defendant relies on what James L.J., when Vice-Chancellor, said in *Adamson* v. *Gatty* (1)—that a man has no absolute right to the same quantity of light as has always come to his ancient windows. The question always is whether there has been a substantial diminution of light so as to substantially interfere with the enjoyment or convenient occupation of the premises: and that learned judge, when Lord Justice, took the same view in *Kelk* v. *Pearson* (2) and in *City of London Brewery Co.* v. *Tennant.* (3) *Moore* v. *Hall* (4) does not support the proposition that mere diminution of light that has been used for extraordinary purposes is in itself a ground of action; and it is to be observed that neither *Kelk* v. *Pearson* (5) nor *City of London Brewery Co.* v. *Tennant* (6) was there cited. The Prescription Act did not alter the character of the right to light, but only the mode by which that right could be acquired.

In *Corbett* v. *Jonas* (7), which was relied on in the Court below and was a case of an implied grant of light, Kekewich J. held that a claim to an extraordinary amount of light could not be sustained, but only a claim to sufficient light for ordinary purposes.

Cur. adv. vult.

Nov. 13. The judgment of the Court (Lord Alverstone C.J., Vaughan Williams, and Romer L.JJ.) was delivered by

ROMER L.J. In this case Wright J. has found that certain of the plaintiffs' ancient lights have been substantially interfered with by the defendant's new building. He has also found that the plaintiffs have in fact thereby suffered substantial damage, for he assesses their losses, as to the tenant

(1) W. N. (1870) 184.
(2) L. R. 6 Ch. 809, 811.
(3) L. R. 9 Ch. 212, 216.
(4) 3 Q. B. D. 178.
(5) L. R. 6 Ch. 809.
(6) L. R. 9 Ch. 212.
(7) [1892] 3 Ch. 137, 147.

at 100*l.*, and as to the reversioners at 200*l.* On these findings one would have expected judgment entered for the plaintiffs; but the learned judge has made an additional finding, and by reason of that he has dismissed the action. This finding is to the effect that, notwithstanding the substantial diminution of the ancient lights caused by the defendant's new building, abundant light remains for all ordinary purposes of inhabitancy or business. We felt some doubt at first as to what this additional finding meant, and whether it was not contradictory to the other findings; but after further consideration of the judgment, and after consulting Wright J., we have no doubt as to the meaning of the additional finding. It means that, though the light coming from certain of the ancient lights has been substantially diminished, and though the rooms thereby lighted have been so darkened that both the tenant and the reversioners have suffered substantial damage, yet the darkened house is still as useful for purposes of habitation or business as what we may term the average run of houses. In other words, the learned judge appears to think that, as a matter of law, there is a sort of standard in the matter of light, and that if a particular house is by its ancient lights extremely well lighted, those lights may with impunity be substantially interfered with so long as the house in its darkened condition does not fall below the standard. In our opinion that is an erroneous view of the law.

We do not propose to go through all the numerous cases which were cited before us and before Wright J. It is not necessary to do so for the purposes of this case. No doubt, before *Kelk* v. *Pearson* (1) was decided, and still more so before the judgment of Lord Cranworth in *Yates* v. *Jack* (2), some inaccurate views as to the nature of the right to light acquired under the statute were entertained and expressed by various judges; and in some of the earlier cases, and, indeed, even in some later ones, language has been employed in some judgments which would appear to support the view of the law taken by Wright J. But we think that in recent times the law has become settled, and we propose to state shortly, so far

(1) L. R. 6 Ch. 809. (2) L. R. 1 Ch. 295.

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as is material for the immediate point arising in this case, what we understand the law to be.

The statute in its terms might appear to sanction the view that the right to light once acquired was absolute as to every part of it, so that any interference, however slight, would be wrongful. But it was soon established that the statute had not altered the character of the right, though it had altered the method by which it could be acquired; and it was held that the right would not be interfered with if there were no substantial diminution of the light such as to cause substantial damage to the tenant or owner. And, in considering what would be a substantial diminution and substantial damage, it is held that the proper point of view is to pay regard, not to what some person having fantastic or peculiar views might choose to regard as a substantial diminution or as substantial damage, but to the views of persons of ordinary sense and judgment. And, in particular, in considering whether a house has been substantially injured, it is proper to have regard to the ordinary uses by way of habitation or business to which the house has been put, or might reasonably be supposed to be capable of being put. We do not say that in the recent cases the law has been expressed exactly in the language we have used, but we mean that, though various expressions have been used by different judges, yet in substance, and as the result of what are now regarded as binding authorities, the above is a fair statement of the law as it is to be gathered from those judgments which are now to be regarded as sound. And at the present day, if ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief.

With regard to the exact point arising in this case, we think that, since the case of *Kelk* v. *Pearson* (1), it is impossible to hold properly that the statutory right is not interfered with merely because after the interference the house may still come up to some supposed standard as to what a house ordinarily requires by way of light for purposes of inhabitancy or business. Some houses, owing to their having numerous or particularly

(1) L. R. 6 Ch. 809.

advantageous ancient lights, are extremely valuable for purposes of habitation or of business. In these cases an owner of the servient tenement cannot justify a substantial interference with these lights, or (it may be) a complete stoppage of some of them, causing great damage to the house, on the ground that other houses in the neighbourhood, or even the majority of those houses, or some imaginary standard house, are or is not better lighted than the injured house after the injury. Nor is the fact that, owing to the house being very well lighted, certain special businesses requiring much light are being or can be carried on, to be wholly disregarded in considering the effect of an interference, merely because after the interference other businesses not requiring much light can be carried on. Yet it is to an opposite conclusion that Wright J. appears to have come. Immediately after stating, with regard to the room on the ground floor affected by the interference with its lights, "that abundant light remains for all ordinary purposes of inhabitancy or business," he proceeds to point out what he means by that by observing that "the room in its present state is better lighted than the ground-floor front rooms in many of the principal streets"; and, accordingly, he gives no relief to either tenant or reversioners. And it is especially noticeable, as to the reversioners, that he considers they have in fact suffered damage to the extent of 200*l.*, and that could only be on the ground that the house had been permanently affected in its letting value; and even as to the tenant we may observe that a very well lighted house is not being unreasonably used because a business requiring much light is being carried on there.

The precise point arising in this case was clearly dealt with by Mellish L.J. in *Kelk* v. *Pearson* (1), where he says (2): "I cannot think that it is possible for the law to say that there is a certain quantity of light which a man is entitled to, and which is sufficient for him, and that the question is, whether he has been deprived of that quantity of light. It appears to me that it is utterly impossible to make any rule or adopt any measure of that kind. It is essentially a question of

(1) L. R. 6 Ch. 809. (2) L. R. 6 Ch. at p. 814.

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comparison, whether by reason of deprivation of light the house is substantially less comfortable than it was before." This statement has been since approved of and followed in many cases, and we believe it accurately states the existing law on the subject. So far as other judges have in their judgments used expressions which appear to, or do in fact, conflict with what Mellish L.J. has said, those expressions cannot, in our opinion, be justified. And in particular we may say that the opposing views expressed by Malins V.-C. in *Lanfranchi* v. *Mackenzie* (1) and *Dickinson* v. *Harbottle* (2) cannot now be regarded as sound.

That being so, we think that in the present case the plaintiffs are entitled to relief. The case has been treated before us by both parties as one turning solely on the findings of Wright J. He has found substantial interference with light, and substantial damage to the plaintiffs; and, that being so, there should be judgment for them for the damages assessed. The defendant ought to pay the costs of the action and of this appeal.

Appeal allowed.

Solicitors: *Law & Worssam, for R. H. Buckby, Leicester; J. A. Collins, for J. & S. Harris, Leicester.*

(1) L. R. 4 Eq. 421. (2) 28 L. T. (N.S.) 186.

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 5.

BEVAN *v.* CRAWSHAY BROTHERS (CYFARTHA), LIMITED.

Employer and Workman—Compensation—Deceased Workman—Dependants in part dependent upon his Earnings—Funeral Expenses — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I. s.* 1 (*a*), *sub-s.* (*ii.*).

The arbitrator, in assessing the amount payable as compensation under the Workmen's Compensation Act, 1897, Sched. I. s. 1 (*a*), sub-s. (ii.), to a person in part dependent upon the earnings of a deceased workman, is entitled to take into consideration expenses in respect of the workman's funeral.

APPEAL from the award of the judge of the Glamorganshire County Court upon a claim for compensation in respect of the death of a workman under the Workmen's Compensation Act, 1897.

The deceased was a boy, who had been employed by the appellants in their colliery, and whose death had been occasioned by an accident arising out of and in the course of his employment by them. The respondent was the mother of the deceased, who claimed compensation under the Workmen's Compensation Act, 1897, as having been partly dependent upon his earnings at the time of his death. The weekly earnings of the deceased, who lived with his mother, appeared to have been handed over to her as a contribution towards the maintenance of her family. The county court judge found that a sum of 3*s.* a week represented the balance that remained of the boy's weekly earnings, after allowing for the expenses of his maintenance, and he awarded to the respondent by way of compensation the weekly sum of 3*s.* over a period of three years, if she should so long live, and the sum of 6*l.* 8*s.*, the costs of the funeral of the deceased.

B. F. Williams, K.C., and *S. T. Evans, K.C.*, for the appellants. The county court judge had no power under the

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Workmen's Compensation Act, 1897, to include a sum for funeral expenses in the compensation awarded. The only case in which the Act admits the funeral expenses of a deceased workman as an element of compensation is that in which the workman leaves no dependants. In that case by sub-s. (iii.) of s. 1 (*a*) of the 1st schedule to the Act the amount of compensation is to be the reasonable expenses of his medical attendance and burial, not exceeding 10*l*. Under sub-ss. (i.) and (ii.) of the section, if the workman leaves dependants, the compensation is to be a sum based on the amount of the workman's wages during a certain period, subject to certain limits by way of minimum and maximum. Under sub-s. (i.), if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, the compensation is to be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of 150*l*., whichever of those sums is the larger, but not exceeding in any case 300*l*., subject to certain deductions; or, if the period of his employment has been less than three years, then the compensation is to be a certain amount calculated on his average weekly earnings. Under this sub-section the amount of the compensation clearly is one to be fixed with reference to considerations which cannot include funeral expenses. Under sub-s. (ii.), which deals with cases, such as the present, where the workman leaves dependants in part dependent upon his earnings at the time of his death, the compensation is to be "such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." It is submitted that the meaning of that sub-section is that the arbitrator is to award such a proportion of the sum which, if the workman had left dependants wholly dependent upon him, would have been awarded under sub-s. (i.), as may be reasonable and proportionate to the injury to the dependants who were only partially dependent upon his earnings; and therefore funeral expenses are as much excluded under sub-s. (ii.) as under sub-s. (i.). The words "reasonable

and proportionate to the injury," &c., seem to have been adopted by the Legislature from the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2, which provides that in cases under that Act, "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." Under that Act it has been held that funeral expenses cannot be given as part of the damages: *Dalton* v. *South Eastern Ry. Co.* (1)

W. D. Benson, for the respondent. It is not suggested that the county court judge could have awarded any amount for funeral expenses in addition to the maximum amount which might have been awarded, if the case had come under sub-s. (i.), for that is expressly forbidden by the terms of sub-s. (ii.); but there seems to be no reason why, in determining "the sum reasonable and proportionate to the injury to the said dependants" under sub-s. (ii.), he should not be at liberty to take into account the funeral expenses, which in reality formed part of the loss sustained by the dependants in consequence of the workman's death. The terms of sub-s. (iii.) shew that the Legislature clearly contemplated funeral expenses as a subject-matter for compensation under the Act. That being so, why should they be excluded in ascertaining the amount of the injury to the dependants under sub-s. (ii.)? That sub-section, no doubt, does not specifically provide for funeral expenses as a matter of compensation, but it leaves it to the arbitrator to fix a sum proportionate to the loss actually occasioned. In ascertaining this the funeral expenses would be an element. The sum awarded by the county court judge is far within the maximum specified by the Act, and, if he had not specifically mentioned that he awarded so much for funeral expenses, no objection could have been taken to his award. The Act appears to leave it entirely a matter of discretion for him what sum within the maximum should be fixed as the sum reasonable and proportionate to the injury sustained by the dependants. That being so, it seems impossible to say that his award is bad, merely because he has mentioned in it that he took into

(1) (1858) 4 C. B. (N.S.) 296.

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consideration the funeral expenses in fixing the total sum to be awarded.

COLLINS M.R. In this case, the county court judge having taken into account a certain sum of money for expenses of the deceased boy's funeral as a factor in arriving at the total amount of the compensation which he awarded, it is contended for the appellants that he has, in so doing, exceeded his jurisdiction, because the Workmen's Compensation Act, 1897, does not empower him in such a case as this to award anything for funeral expenses. This case falls within sub-s. (ii.) of s. 1 (*a*) of the 1st schedule of the Act, which provides that "if the workman does not leave any such dependants" (i.e., dependants wholly dependent upon his earnings at the time of his death), "but leaves any dependants in part dependent upon his earnings at the time of his death," the compensation shall be "such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." It was said that the latter words of the sub-section were really undistinguishable from those of the Fatal Accidents Act, 1846, under which it was decided that funeral expenses could not be recovered. The words of the sub-section are no doubt similar to those of the Fatal Accidents Act, 1846, but we must, I think, look at the three sub-sections of s. 1 (*a*) as a whole, in order to see what the Legislature contemplated with regard to funeral expenses under the Workmen's Compensation Act, 1897. Sub-s. (i.) provides that "if the workman leaves any dependants wholly dependent upon his earnings at the time of his death," the compensation shall be "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case 300*l.*, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been

less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer." Then comes sub-s. (ii.), which I have already read. Sub-s. (iii.) provides that "if he leave no dependants," the compensation shall be "the reasonable expenses of his medical attendance and burial, not exceeding 10*l*." That sub-section seems to assume that, where the deceased workman leaves no dependants, his representatives will have to pay those expenses, and that they ought to be reimbursed the amount of them. Why should these expenses be repayable in the case where the deceased workman leaves no dependants, and yet should not be taken into consideration in determining the sum reasonable and proportionate to the injury to the dependants to be paid as compensation under sub-s. (ii.)? It seems impossible to suggest any reason why this should be intended. The statute has fixed a maximum amount in the case of compensation to dependants on a deceased workman, and it would, no doubt, not be competent for the arbitrator under the Act to award anything in addition to the maximum amount by way of funeral expenses; but the Act itself shews that it contemplates funeral expenses as a subject of compensation, and I do not see anything to prevent the arbitrator from taking them into account in considering what sum he shall award under sub-s. (ii.) within the maximum. The judge has within that limit to consider what amount, more or less, he will give, and it is obviously a material consideration in fixing the amount that funeral expenses may have been incurred. In this particular case the judge has stated in writing that he has taken into account in his award a particular sum for funeral expenses. It cannot, I think, make any real difference in the case that he has done this; and, if he had not done so, but had merely awarded the total sum which he has awarded as being a sum reasonable and proportionate to the injury to the applicant, that sum being within the maximum amount mentioned by the Act, it is difficult to see how any legal objection could have been taken to his award. For these reasons I think the appeal should be dismissed.

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STIRLING L.J. The question in this case arises in the following manner. The county court judge has included in the amount awarded as compensation a certain sum for funeral expenses, and it is said that he had no power in a case like the present to do so. It is contended for the appellants that, in the case of dependants partly dependent on the workman, there is no power to award anything for funeral expenses, that power being confined to cases where the workman leaves no dependants. I am unable to agree in that view of the meaning of the Act. In a case like that before us the Act provides that the compensation shall be such sum as "may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." The death of the boy in this case necessarily put the dependants, his relatives, to the expense of his funeral. If this question were res integra, I should say that such expenses were a matter to be taken into consideration in determining the amount of compensation to be paid under the words which I have quoted from the Act. I admit that those words very closely resemble the words in the Fatal Accidents Act, 1846; and it has been held that under that Act funeral expenses could not be made a subject of compensation. But it must be observed that there is this difference between that Act and the Workmen's Compensation Act, 1897, that in the former Act there is nowhere any mention of funeral expenses, whereas in sub-s. (iii.) of s. 1 (*a*) of Sched. I. of the latter Act it is expressly provided that, in the case where the deceased workman leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding 10*l*., may be awarded as compensation. That being so, why should not these expenses be an element to be taken into consideration, where there are dependants, for the purpose of determining under Sched. I. s. 1 (*a*), sub-s. (ii.), what is a sum reasonable and proportionate to the injury to them? I think it would be unreasonable to construe the Act as excluding funeral expenses from consideration in such a case, while admitting them in the case where there are no dependants.

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MATHEW L.J. I agree. I think that we should be defeating the objects which the Legislature clearly had in view, unless we held that, subject to the limit imposed by the Act in fixing a maximum amount, funeral expenses may be included under Sched. I. s. 1 (*a*), sub-s. (ii.), in determining what is a sum "reasonable and proportionate to the injury to the said dependants." Without including them, a sum reasonable and proportionate to the injury caused to the dependants, who have to defray such expenses, would not be awarded.

Appeal dismissed.

Solicitors for appellants: *Schultz & Sons, for Gwilym James, Charles & Davies, Merthyr Tydfil.*

Solicitors for respondent: *Ullithorne & Co., for D. W. Jones, Merthyr Tydfil.*

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[IN THE COURT OF APPEAL.]

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KNIGHT *v.* CUBITT & CO.

Employer and Workman—Compensation—Building exceeding Thirty Feet in Height—"Undertakers"—Sub-contractor, Workman of—Work not merely ancillary to Business of Undertakers—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

A firm of builders entered into a contract with the owner of two adjoining houses in a street, numbered respectively 16 and 17, for the demolition of No. 17 and the erection of a new building on the site of it, and for alterations and repairs to No. 16. The firm habitually entered into contracts for the demolition of buildings and the erection of new buildings on their sites. It was, however, their practice not to execute the work of demolition themselves, but to sub-contract for that work with another person, which they accordingly did with regard to the house No. 17. The two houses respectively, and the party wall common to both, were of a height exceeding thirty feet. An accident happened to a workman employed by the sub-contractor in the demolition of No. 17 in the course of his employment, which caused his death. At the time of the accident No. 17 had been reduced to a height of about eleven feet, excepting the party wall, which was not to be pulled down, and remained standing. On a claim by the workman's widow for compensation for herself and children as dependants on the deceased under the Workmen's Compensation Act, 1897, the county court judge found that the workman was

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employed in the demolition of a building which at the time of the accident exceeded thirty feet in height, and that the builders were liable to make compensation to his dependants under s. 4 of the Act:—

Held, that there was evidence to support the county court judge's finding as above mentioned; that the builders were "undertakers" of the work of demolition within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2; that that work was not merely ancillary to their business; and therefore that they were liable under s. 4 of the Act.

APPEAL from the award of the deputy judge of the Brompton County Court upon a claim for compensation under the Workmen's Compensation Act, 1897.

The respondent was the widow of a workman who had been in the employ of one Clements, and had been killed by an accident arising out of and in the course of his employment. The appellants, who were builders, had entered into a contract with Messrs. Woolland, the owners of two adjoining houses, numbered respectively 16 and 17 in William Street, Knightsbridge, for the demolition of No. 17 and the erection of a new building upon the site of it, and for certain alterations and repairs to No. 16. The appellants habitually made contracts for the demolition of buildings, and the erection of new buildings on their sites, and it was usual for them to insert in their contracts what was called a "pulling down" clause; but it was their practice not to carry out the work of demolishing buildings themselves, that being a kind of work not done by large building firms, but sub-contracted for with a special class of contractors called "house-breakers." The appellants accordingly entered into a sub-contract for the demolition of the house No. 17 with Clements. The entire block formed by the houses originally exceeded thirty feet in height, but at the time of the accident No. 17 had been reduced to the height of about eleven feet, excepting the party wall common to the two houses, which exceeded thirty feet in height, and which was not to be pulled down. The deceased man, while engaged in the work of demolishing the house No. 17, was killed by a fall. A fellow-workman of the deceased, who was called at the trial, stated that, at the time of the accident, he was cutting a piece of the party wall about a foot away from the deceased.

The respondent claimed compensation under the Workmen's Compensation Act, 1897, for herself and children, as dependent upon the earnings of the deceased.

The county court judge found that the deceased was engaged on the demolition of a building which at the time of the accident was more than thirty feet high, and awarded compensation against the appellants as being liable under s. 4 of the Act.

Ruegg, K.C., and *Minton Senhouse*, for the appellants. The case depends upon the provisions of s. 4 of the Workmen's Compensation Act, 1897, which in certain cases renders "undertakers" liable for compensation as regards workmen employed by a sub-contractor. To come within that section the appellants must have been "undertakers" in respect of the work within the meaning of the Act. It is contended that they were not. Sect. 7, sub-s. 2, defines "undertakers," in the case of a building, as meaning "the persons undertaking the construction, repair, or demolition." It is submitted that, having regard to the context, the definition refers to persons who actually execute the work in question or some substantial portion of it, and who will therefore be on the spot and have some control over the work, and that "undertake" is not merely equivalent to "contract for the execution of" work.

Secondly, the work of demolition was merely ancillary or incidental to, and formed no part of or process in, the trade or business of the appellants. The evidence is clear that the demolition of buildings formed no part of the business which they in fact carried on, and that it formed a separate business carried on by a distinct class of contractors called "house-breakers." The section therefore does not apply to the present case.

[They cited on this point *Pearce* v. *London and South Western Ry. Co.* (1); *Wrigley* v. *Bagley & Wright.* (2)]

Thirdly, the 1st sub-section of s. 7 of the Act, so far as material, provides that, in the case of buildings, the Act shall only apply to employment "on, in, or about any building

(1) [1900] 2 Q. B. 100. (2) [1901] 1 K. B. 780.

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which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished." In the case of a building being constructed, the building is not of a height exceeding thirty feet for the purposes of that section until it actually reaches that height, although it may be intended ultimately to exceed thirty feet in height: *Billings* v. *Holloway* (1); *Hoddinott* v. *Newton, Chambers & Co.* (2) It is submitted that the same reasoning must apply in the case of a building which, though it originally exceeded thirty feet in height, has in the course of demolition been reduced to a height less than that. The fact of the party wall having been left standing can make no difference, for that wall was not to be demolished, but was necessarily to be left standing as part of the adjoining house, which was not to be pulled down: *Rixsom* v. *Pritchard & Renwick.* (3)

[They also cited *Mellor* v. *Tomkinson & Co.* (4)]

Edmond Browne (*Valentine Browne* with him), for the respondent, was not called upon.

COLLINS M.R. I am of opinion that this appeal should be dismissed. Three points have been discussed in the course of the argument. The first was whether the word "undertakers," as used in the Workmen's Compensation Act, 1897, should be so construed as to exclude the appellants in this case. The second point was whether the work which was being done by Clements, the sub-contractor, who was the workman's employer, was merely ancillary or incidental to, and formed no part of, or process in the trade or business carried on by the appellants. The third point was whether the building which was being demolished was one exceeding thirty feet in height within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897.

I will deal first with the third point taken in argument. We have here a finding of the county court judge that the building was one exceeding thirty feet in height at the time of the accident. I do not propose to impugn anything that was

(1) [1899] 1 Q. B. 70.
(2) [1899] 1 Q. B. 1018; [1901] A. C. 49.
(3) [1900] 1 Q. B. 800.
(4) [1899] 1 Q. B. 374.

decided in *Billings* v. *Holloway* (1), which indeed I am not entitled to do. But I think that, on the finding of the county court judge, this case stands quite independently of anything decided in that case. All that we have to do is to see whether there was any evidence on which the county court judge might reasonably find as he did. The question is really one of fact, not of law; and, provided there was any evidence to support the finding, we have no jurisdiction to review it. It is argued that there was no evidence for the county court judge on that point. It appears from the evidence that the workman was employed in the demolition of a building, and that a substantial part of it, one which was essential to it while it existed as a house, namely, the party wall, remained standing to a greater height than thirty feet; and it also appears from the evidence that work was actually being done on the party wall by a fellow-workman about a foot away from the deceased when the accident happened. I am not prepared under these circumstances to say that there was no evidence to justify the finding of the county court judge. The contention of the appellants on this point cannot therefore prevail.

With regard to the other points taken, it was said that the appellants were not "undertakers" of the work of demolition, and that that work was merely ancillary to their business, because the evidence shewed that they did not usually execute the work of demolition by their own workmen. But the answer to both points seems to me to be that the result of the evidence is that it was part of the appellants' business to undertake the demolition of buildings, without which they could not carry on the work of rebuilding; and it is immaterial in my opinion that they found it more convenient in practice to subcontract for that part of the work which they had contracted to do. In this case they contracted to demolish the house, on the site of which they were to build a new building: and this was proved to be in accordance with their usual practice in such cases. Under these circumstances it appears to me clear that they were in fact "undertakers" of the work of demolition according to their usual practice; and I can see nothing in the

(1) [1899] 1 Q. B. 70.

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facts of this case to exclude them from the meaning of the word "undertakers" as used in the Act. I would point out that the question in this case arises under s. 4 of the Act, and under that section the "undertakers" are ex hypothesi persons who have deputed to a sub-contractor the execution of work undertaken by them. The evidence shewing, as I have said, that it was the appellants' usual practice to undertake the work of demolition, it seems to me impossible to say that that work was merely ancillary to the trade or business carried on by them. It follows, therefore, that the case comes within the 4th section, and that the appellants are liable to pay compensation under the Act.

STIRLING L.J. I am of the same opinion. The first question raised, namely, whether the appellants were "the undertakers" of the work on which the deceased workman was employed, turns upon s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, which provides that, in the case of a building, "undertakers" shall mean "the persons undertaking the construction, repair, or demolition." The appellants undoubtedly entered into a contract for the demolition of the building in question, and the erection of a new building in place of it; but it is said that they did not "undertake" the demolition within the meaning of the Act, because it ought to be inferred from the context of the section that the word "undertakers" means persons who actually execute the work or some substantial part of it. But s. 7 must be read together with s. 4; and, on looking at that section, it is clear that the Legislature contemplate that persons may be "undertakers," though they do not execute the work or any substantial part of it themselves, but sub-contract with other persons for the execution of it. It appears to me quite clear that the appellants were "the undertakers" of the work for the purposes of the Act.

Then it was urged that they were exonerated from liability by the last clause of s. 4, on the ground that the work of demolishing the building in question was merely ancillary or incidental to, and was no part of, or process in the trade or

business carried on by them. It was said that the evidence shewed that their business was that of builders, and not demolishers of houses, and that they never pulled down buildings themselves, but for that purpose employed sub-contractors, whose business it was to do so. But the evidence was clearly to the effect that it was their usual mode of doing business to contract for the demolition of buildings for the purpose of rebuilding, and that their forms of contract included a clause by which they contracted for such demolition. The fact that such contracts were habitually entered into is evidence that demolition in connection with rebuilding was part of the business of the firm; and in these circumstances I do not think it can be said that the work of demolition was merely ancillary to and no part of their business. The mere fact that, as a matter of business, they found it more convenient to sub-contract for the performance of this part of the work which they undertook does not appear to me to establish the contrary.

With regard to the third point, namely, as to whether the building exceeded thirty feet in height, I do not wish to add anything to what the Master of the Rolls has said.

MATHEW L.J. I am of the same opinion. I have not been able to entertain any doubt upon the evidence given in this case that it was part of the appellants' business to undertake the demolition of buildings in order that they might erect new buildings. It was stated in evidence that by their usual form of contract they contracted for such demolition. As a matter of convenience to themselves, for the purposes of this part of their business, they make sub-contracts, and do not employ their own men; but this does not prevent their being "undertakers" of the work. It is perfectly clear from the language of s. 4 that it covers the case of persons who, like the appellants in the present case, undertake work such as the demolition of a building, and then enter into a sub-contract for the performance of it by others.

With regard to the other question, namely, whether this building exceeded thirty feet in height at the time of the

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accident, the county court judge has found that it did, and I think that there was evidence to support that finding. If the deceased workman had, instead of being employed on the work of demolition, been employed in shoring up the party wall, and had met with an accident, could it have been doubted that he was employed on, in, or about a building which exceeded thirty feet in height, and was being demolished? There was in this case evidence that a fellow-workman was employed at the time of the accident in cutting away a piece of the party wall. Under these circumstances I do not think that we can say that there was no evidence upon which the county court judge could find as he clearly appears to have done on this point; and, that being so, we have no jurisdiction to interfere with his finding.

Appeal dismissed.

Solicitors for appellants: *Leighton & Savory.*
Solicitors for respondent: *Pattinson & Brewer.*

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[IN THE COURT OF APPEAL.]

ELLIS *v.* WILLIAM CORY & SON, LIMITED.

Employer and Workman—Compensation—"Wharf," Meaning of—Structure moored at a distance from Shore—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1.

A structure moored in a river at some distance from, and not connected with, the shore, which was used for the purpose of discharging coal from ships into barges:—

Held, to be a "wharf" within the meaning of the Factory and Workshop Act, 1895, s. 23, sub-s. 1, and therefore a "factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2.

APPEAL from the award of the judge of the Woolwich County Court upon a claim for compensation under the Workmen's Compensation Act, 1897.

The appellant, a workman who had been in the employ of

the respondents, claimed compensation for injury occasioned to him by an accident arising out of and in the course of his employment. The appellant was at the time of the accident working in the hold of a steamer lying in the Thames alongside of a structure known as Atlas No. 3. The sole question raised was whether this structure was a "wharf" within the meaning of the Factory and Workshop Act, 1895, s. 23, and consequently a "factory" within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897. The structure as described in the evidence was as follows. It was moored in the Thames off Charlton, 500 feet from the south shore and 350 yards from the north shore, by chains fastened to piles driven into the bed of the river. It was 500 feet long and 45 feet wide, and had a draught of 6 feet 6 inches, standing up 6 feet above the level of the water. There were upon it nine hydraulic cranes with "grabs" attached. When the crane is at work, the "grab" descends into the hold of the coal steamer alongside, and takes hold automatically of a ton and a half of coal. The crane then lifts it up, and turns it round into a hopper, in which the coal is automatically weighed, and then passes it through a shoot into a barge lying on the other side of the structure. There were on the structure a blacksmith's shop, a carpenter's shop, plant for generating electricity, and a coffee-shop for the men employed. There was no communication between the structure and the shore except by means of boats. The appellant was in the hold of the steamer engaged in placing coal in a position for the "grab" to operate properly upon it, when the "grab" struck him, causing the injuries in respect of which he claimed compensation. The county court judge held that the structure was not a wharf within the meaning of the Act, and therefore refused to award compensation to the appellant.

Ruegg, K.C., and *W. M. Thompson*, for the appellant. The structure in question is used for the purpose of a wharf, and, if it had been placed close to the bank of the river, so that it could be reached by gangways, it could hardly be argued that it was not a wharf within the meaning of the Act. It cannot

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make any material difference that it is removed some distance from the shore.

Bankes, K.C., and *H. Nield*, for the respondents. It may be admitted that this structure was used for some of the purposes for which a wharf is used, and that, if it were close to the shore, it might be called a wharf. But it does not follow that it is a wharf within the proper meaning of the word. It is not true to say that, because a thing answers the same purpose as another thing, it can therefore be described by the same word. In the absence of special definition, the word "wharf," as used in the Act, must receive its ordinary meaning in the English language. It is an essential part of the idea of a "wharf," as generally understood, that it should be part of, or close to and connected with the shore. The definitions given of a wharf in all dictionaries of the English language involve that idea: see also *Haddock* v. *Humphrey*. (1) The structure in this case is really a floating derrick, which is used for some of the purposes of, but is not, a wharf.

[They cited *Hennessey* v. *McCabe*. (2)]

COLLINS M.R. The only question in this case is whether the structure described in the judge's notes of the evidence is a wharf or not. It certainly fulfils some at all events of the functions of a wharf. It is a structure on which cranes are placed, for the purpose of taking coal out of one vessel and putting it into another, and it is attached to the bed of the river in a sufficiently permanent and stable manner to admit of that operation being performed. There can be no doubt, and it was admitted by the respondents' counsel, that, if it had been attached to the bed of the river in such a position as to be capable of being reached from the shore by a gangway, or some longer means of access, such as the connections between the shore and the landing-stages at Liverpool, it would be a wharf. But it was moored at a distance of 500 feet from the south shore of the river; and the point was taken that, being situated at such a distance from the shore, it did not come within the

(1) [1900] 1 Q. B. 609. (2) [1900] 1 Q. B. 491.

popular meaning of the word "wharf." I think it very likely that, at the time when the Factory Acts were being framed, from which the definition of a "factory" is incorporated into the Workmen's Compensation Act, 1897, such a kind of "wharf" was not specifically contemplated; but I do not think that we ought to draw a hard and fast line, so as to confine the meaning of the word "wharf" for the purposes of the Workmen's Compensation Act, 1897, solely to wharves constructed exactly in the manner generally used at that date. I think that we ought to construe it so as to include altered modes of constructing wharves devised in later times to meet altered conditions of business. It has been found convenient in the present case, for the purpose of meeting the exigencies of business, to substitute for the ordinary mode of constructing wharves, namely, in close contiguity to the shore, a structure further out from the shore at which passing steamers may discharge their coal. It is clear that the workmen employed in carrying out that operation are substantially doing just the kind of work contemplated by the Workmen's Compensation Act, 1897. There is no essential difference in the work: the only actual difference is that the process is carried on somewhat further from the shore than in the case of the ordinary wharf. In my opinion the structure here in question was a "wharf" for the purposes of the Act. Though I can understand that the county court judge might not unreasonably come to the opposite conclusion, I think that, if we were to adopt his view, we should be unduly narrowing the benefit intended to be given by s. 7 of the Workmen's Compensation Act, 1897. For these reasons I think the appeal should be allowed.

STIRLING L.J. I agree. The respondents' counsel fairly admitted that, if the structure here in question were placed so near the shore that a person could step upon it, or it could be reached by means of a bridge, it would be a wharf. The sole point which he made was that it was at such a distance from the shore that it could not be said to be a "wharf." I do not think that its distance from the shore is an essential element

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in determining whether the structure is in the nature of a wharf.

MATHEW L.J. I am of the same opinion. In this case, instead of the ordinary wharf on shore, at which ships may lie, in order that their cargoes may be unloaded and stored, and reloaded into lighters, there is substituted, with a view to economy of time and labour, a structure at some distance from the shore, so that vessels coming alongside may be unloaded into vessels on the other side. The counsel for the respondents was compelled to admit that, if such a structure were close to the bank it would be a wharf, but he contended that this structure was so far removed from the shore that it could not be called a wharf. I cannot think that the mere fact of its being removed some distance from the shore, in order to allow the process of unloading cargoes to be more conveniently carried on, can make any essential difference in the character of the structure.

Appeal allowed.

Solicitors for appellant: *Buchanan & Hurd.*

Solicitors for respondents: *Deacon, Gibson, Medcalfe & Marriott.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 13.

BOARDMAN *v.* SCOTT & WHITWORTH.

Employer and Workman—Compensation—"Accident," Injury by—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

It was the duty of a workman employed in a factory to remove the empty yarn beams from looms. He had, in the ordinary course of his duty, removed such a beam, weighing about 100 lb., from a loom, and was in the act of lifting it on to his shoulder, when, finding that it was unevenly balanced, he gave it an extra lift up to get it on his shoulder. The sudden strain so caused had the effect of lacerating the muscles on the right side of his back. Before this occurrence he was in good health, and had not found anything wrong with his back. Upon a claim made by him for compensation under the Workmen's Compensation Act, 1897, the county court judge found that he had been injured by an "accident":—

Held, that the decision of the county court judge was correct.

APPEAL from the award of the judge of the Manchester County Court upon a claim for compensation under the Workmen's Compensation Act, 1897.

The respondent was a workman, who had been employed as a power-loom overlooker in the appellants' factory, and he claimed compensation in respect of injuries occasioned by an accident arising out of and in the course of his employment.

It was his duty to remove the empty yarn beams from the looms in the factory. These beams were made of iron, and were tubes of 4½ inches diameter, with flanges at each end to keep the yarn in place. On the occasion in question the respondent had got a beam out of the loom, and was in the act of lifting it on to his shoulder, when he found it was unevenly balanced. He gave it an extra lift up to get it on his shoulder, when he felt his back crack. It appeared from the medical evidence that several fibres of the muscles on the right side of the respondent's back in the lumbar region had been lacerated, and that such an injury might be caused by a sudden strain in lifting a weight, especially if the strain were unexpected. The respondent previously to this occurrence had been in good health, and had not found anything wrong with his back. The

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beam was stated to be of medium size, weighing about 100 lb. The respondent had been employed in handling such beams for several years. The height from the floor of the beams was about 1 foot to 1 foot 6 inches, and the length of the beam about 50 inches. The respondent in his evidence described the mode of lifting the beams as follows: "I put one hand over and one hand under the beam, pretty well one hand at each end; I then rest the flange on my left knee, and hoist the other end straight up to get it on my right shoulder, the object being to get it on my right shoulder, and I then rise with the beam. The beam is upright before I lift it."

It was submitted that there was no evidence of any accident.

The county court judge in giving judgment said that the cause of the man's muscles being torn was obscure; that it might have been a slip or a twist of the body, or a wrong movement of the body; that it was in his view an unexpected or fortuitous movement of the man himself, throwing an undue weight or strain on the muscles of the back—muscles that, if used in the ordinary way, were sufficient for the purpose for which they were being used, and had been used for years. He therefore decided that injury had been occasioned to the respondent by an accident within the meaning of the Act, and awarded compensation accordingly.

A. Powell, for the appellants. What happened in this case cannot be called an accident. The decisions shew that, to constitute an accident, within the meaning of the Act, there must be something in the nature of a fortuitous and unexpected event, caused by something external to the person injured himself: *Hensey* v. *White* (1); *Lloyd* v. *Sugg & Co.* (2); *Walker* v. *Lilleshall Coal Co.* (3) In *Hensey* v. *White* (1) a workman was doing his ordinary work in turning a wheel, but, owing to his diseased condition, in so doing, he ruptured blood-vessels in the stomach. It was held on these facts that the injury was not caused by an accident, not having arisen from any fortuitous event, external to the man himself, but from his internal

(1) [1900] 1 Q. B. 481. (2) [1900] 1 Q. B. 486.
(3) [1900] 1 Q. B. 488.

condition. In *Lloyd* v. *Sugg & Co.* (1) a workman was holding a flatter, the flat head of which was being hammered by a boy; in consequence of something getting into the boy's eye, he made a mis-hit, and hit the round rod of the flatter instead of its head, and thereby jarred the workman's hand, which brought on gout in the hand, the man being of a gouty diathesis. It was held that in that case there was the fortuitous external element which constituted an accident. It is submitted that the present case falls within *Hensey* v. *White* (2) and not within *Lloyd* v. *Sugg & Co.* (1) There was nothing fortuitous and external here which caused the accident. The man was doing his ordinary work in lifting the beam, and the injury resulted from the fact that his muscles were not strong enough to stand a strain arising in the ordinary course of that work. There must be something fortuitous and external to the man himself to constitute an accident.

[COLLINS M.R. The word "external" appears to have been rightly used by the late Master of the Rolls in *Walker* v. *Lilleshall Coal Co.* (3) with regard to the facts of the particular case, in which he was contrasting injury caused by inherent defect in the person injured himself, as in *Hensey* v. *White* (2), with injury occasioned by some fortuitous external cause, as in *Lloyd* v. *Sugg & Co.* (1); but it does not seem to me that there is anything in the language so used by him to assist the appellants' contention.]

The facts in this case are substantially the same as those in *Roper* v. *Greenwood* (4), where it was held that there was no accident.

[COLLINS M.R. There the person claiming compensation was injured through voluntarily undertaking to lift something which she knew to be too heavy for her. There was no element of the fortuitous and unexpected in that case.]

He also cited *Timmins* v. *Leeds Forge Co.* (5)

Ruegg, K.C., and *Edmond Browne*, for the respondent, were not called upon.

(1) [1900] 1 Q. B. 486.
(2) [1900] 1 Q. B. 481.
(3) [1900] 1 Q. B. 488.
(4) (1900) 83 L. T. 471.
(5) (1900) 83 L. T. 120.

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COLLINS M.R. I think that in this case the workman was injured by an accident. It appears to me that the cases cited by the appellants' counsel are really all consistent, and that they are all opposed to his contention. We have in the present case, in my opinion, the element which is there said to be essential to an accident, namely, that it should be something fortuitous and unexpected. The workman was doing work which, no doubt, he was accustomed to do, but, in the course of doing it, he got a beam into such a position that, unless it was balanced by a sudden and rapid movement on his part, it would have fallen. He was obliged to adopt rapid means to meet a sudden emergency, and, in so doing, he caused an unexpected strain to the muscles of his back. The decisions cited do not affect to give an exact definition of an "accident," but I think they shew that in the present case there were all the necessary elements of one. The decisions after all can only furnish illustrations on each side of the line. I think that the present case furnishes a very good illustration of that element of the fortuitous and unexpected, which is the essential characteristic of an accident. For these reasons I think that the appeal must be dismissed.

STIRLING L.J. concurred.

MATHEW L.J. I agree. I think that, to determine what constitutes an accident, one must discriminate between what will occur in the ordinary course of the employment, and what may occur. Something which will occur in the ordinary course of a workman's employment cannot be called an accident. On the other hand, if what has occurred is not what will occur in the ordinary course, but the fortuitous and unexpected element comes in, then there is an accident.

Appeal dismissed.

Solicitors for appellants: *Hurd & Son, for Payne, Galloway, & Payne, Manchester.*

Solicitors for respondent: *Indermaur & Browne, for Gardner & Son, Manchester.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 15.

FIELD *v.* LONGDEN & SONS.

Employer and Workman—Compensation—Injury occasioned by Accident—Incapacity for Work—Arbitration—Condition precedent to Jurisdiction of Arbitrator—Question as to Liability to Pay, or as to Amount or Duration of, Compensation — Agreement by which Question settled — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 3.

Where, a workman having been incapacitated for work by an accident arising out of and in the course of his employment, his employers had, since the second week after the accident, paid to him, by way of compensation, weekly payments of the full amount mentioned in Sched. I. s. 1 (*b*), of the Workmen's Compensation Act, 1897, and promised to continue to do so during the period of his incapacity; but the workman, nevertheless, filed a request for arbitration in the county court, and the county court judge made an award for compensation in his favour:—

Held, that, under the Workmen's Compensation Act, 1897, s. 1, sub-s. 3, it was a condition precedent to the jurisdiction of the county court judge that a question should have arisen as to the liability to pay, or as to the amount or duration of, compensation under the Act, and that, no such question having arisen, the county court judge had no jurisdiction to make an award.

APPEAL from the award of the judge of the Sheffield County Court on a claim for compensation under the Workmen's Compensation Act, 1897.

The respondent was a workman, who had been in the employ of the appellants, and who claimed compensation for injury occasioned to him by an accident arising out of and in the course of his employment.

The accident occurred on October 29, 1900. The respondent being injured so as to be incapacitated for work, an insurance company, with whom the appellants had insured against liability under the Act, had, as representing the appellants, since the second week after the accident, made weekly payments of 15*s.* to the respondent, that sum being one-half of the wages which he had been earning previously to the accident. On April 10, 1901, a solicitor wrote on the respondent's behalf to the appellants, giving formal notice of the accident, and

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that the respondent claimed compensation. On April 12 the insurance company wrote to the respondent's solicitor as follows: "We have received from our assured your favour of the 10th instant addressed to them, and should be pleased if this claim could be finally disposed of. Allowances have been paid your client from November last, and we were in hopes he would shortly resume work. Having regard to the payments already made, will you kindly name what would be accepted in lieu of further allowances, and we shall be pleased to consider same." On April 17 the respondent's solicitor replied as follows: "I have seen my client this morning, and he will be willing to take 75*l.* with 5*l.* 5*s.* for my costs in settlement of the matter. I learn from the doctor that he will be a considerable number of weeks before he is even fairly well, and possibly his leg may never be right again." On April 19 the insurance company replied as follows: "We thank you for your letter of the 17th instant, and, having regard to allowances already paid, regret we cannot agree to pay so large a sum as 75*l.* in settlement. We will arrange for medical examination, and continue weekly payments during incapacity." On April 24 (1) the respondent filed a request for arbitration in the county court, claiming as compensation 15*s.* per week during incapacity. At this time the weekly payments to the respondent were still being continued. On April 25 the insurance company wrote to the respondent's solicitor to the following effect: "We have now received a medical report upon this man's condition, and learn that, while he has recovered from the effects of the fractured skull, his right leg is still weak. He will no doubt be ready for full work in three months' time. Up to the present nearly 20*l.* allowances have been paid him, and we suggest that a further sum of 15*l.*, and 5*l.* 5*l.*, your costs, will fairly meet this case. This we are willing to pay provided that the matter can be ended forthwith." On April 26 the respondent's solicitor replied, stating that his client would not accept the offer made. On April 30

(1) It will be seen from the dates that the time had not arrived when any question as to the redemption of the liability to make weekly payments for a lump sum could arise under Sched. I. s. (13).

the insurance company wrote to the respondent's solicitor as follows: "We have received from our assured the request for arbitration in this case, and, having regard to your letters of the 10th and 17th instant and our letters to yourself of the 12th, 19th, and 25th instant, are surprised this reference should be filed. We are quite prepared to have a memorandum filed, but would remind you that an effective agreement to pay your client compensation under the terms and provisions of the Workmen's Compensation Act is in force, and in view of these facts it is unreasonable to institute arbitration proceedings." In the answer filed by the appellants they took the points that the respondent was not entitled to an award upon the ground that, at the date of the filing of the request for arbitration, no question had arisen as to the liability to pay compensation under the Act, or as to whether the employment was one to which the Act applied, or as to the kind or duration of the compensation under the Act; and, in the alternative, that all questions between the parties had been settled by agreement prior to the date of the request. On the case coming before the county court judge, the point was taken by the solicitor who appeared for the appellants that there was no question to arbitrate upon, inasmuch as the respondent had been regularly and fully paid ever since the accident. In answer the respondent's solicitor contended that the respondent was entitled to have a finding recorded for him. Thereupon the county court judge held that the respondent was entitled to an award for the compensation claimed, and to have the same recorded in his favour.

Manisty, K.C., and *H. W. W. Wilberforce*, for the appellants. There was no jurisdiction to make an award in this case, for the right to arbitration under s. 1, sub-s. 3, of the Act only arises, if a question exists at the time of the request for arbitration, as to the liability to pay compensation under the Act, or as to the amount or duration of that compensation. In this case there was no such question. The appellants were paying to the respondent weekly payments, by way of compensation, of the full amount provided for by Sched. I. s. 1 (*b*), and had

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promised to continue those payments during the period of his incapacity. So long as such payments are being made, the workman has no right to invoke the jurisdiction of the county court. He has no need to take proceedings for arbitration, for, provided he has given notice of his claim within six months of the accident, he can at any time, if the payments are stopped, proceed to arbitration: *Powell* v. *Main Colliery Co.* (1) If the payments are stopped, a question will at once arise, under s. 1, sub-s. 3, and he then can file his request for arbitration. To adopt the respondent's construction of the Act would be merely to put a premium upon unnecessary litigation.

Alternatively, if there ever had been a question between the parties, it had been settled by agreement. There is on the correspondence clear evidence of an agreement by the appellants to pay the utmost amount of compensation which the respondent could claim under the Act. It was suggested at the trial that the respondent was entitled to have a formal judicial declaration that he was entitled to the compensation claimed. But, in order to obtain that result, it is not necessary that the expense of an arbitration should be uselessly incurred; for by Sched. II., s. 8, where there is an agreement for compensation, a memorandum of its terms may be sent by any party interested to the registrar of the county court, and he is to record it in a special register without fee, and thereupon the memorandum is to be enforceable as a county court judgment. It is obvious that, if, upon the workman's giving notice that he proposes to send such a memorandum for registration, the employers object, there would at once be a question for arbitration.

Danckwerts, *K.C.*, and *Arthur Sims*, for the respondent. A memorandum cannot be registered under s. 8 of the 2nd schedule, unless there is either an award or an agreement for compensation. There was no such agreement in the present case. An agreement can only be effected by the assent of two minds. The workman never entered into any agreement to take what the employers offered in this case. The workman may, no doubt, if he chooses, agree with the

(1) [1900] A. C. 366.

employers with regard to the compensation to be paid to him, but he is not bound to do so: he is entitled to elect to make his claim effective by proceedings by way of arbitration under the Act. It is submitted that a question necessarily arises within the meaning of s. 1, sub-s. 3, as soon as the workman makes his claim for compensation and files his request for arbitration. The employer may avoid further costs by filing a notice that he submits to an award under rule 18 (1) of the Workmen's Compensation Rules, 1898; but this was not done in the present case. If this is done, of course the question is at an end. The point that there was an agreement was never taken at the trial. If there is no agreement, the only way in which the workman can get an enforceable right to compensation is by obtaining an award in his favour, which he is entitled to do. An employer may say that he is willing to give the workman anything that the Act can entitle him to, but the workman is not bound to enter into an agreement for compensation; he is entitled to have a judicial award on the matter.

Manisty, K.C., was not called on to reply.

COLLINS M.R. I am of opinion that this appeal should be allowed. In this case a workman was incapacitated for work through an accident in the course of his employment. His employers at once began to pay him the maximum weekly payments provided for by the Act under such circumstances, namely, one-half of the wages which he was earning previously to the accident. These payments continued for a period of between five and six months, when a correspondence took place to which I will presently refer, and in the end the workman filed a request for arbitration. By the answer which they filed, the appellants took the point that there was no question for arbitration, and, on the case coming before the county court judge, they raised the same point again. The right to proceed to arbitration, and the jurisdiction of the arbitrator under the Workmen's Compensation Act, 1897, depend upon s. 1, sub-s. 3, of the Act. It is provided by that sub-section that, "if any question arises in any proceedings

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under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this Act, be settled by arbitration, in accordance with the second schedule to this Act." It is thus by the terms of the sub-section made a condition precedent to the right to proceed to arbitration, and to the arbitrator's jurisdiction, that a question should have arisen as to one or more of three matters, namely, liability to pay compensation, amount of compensation, and duration of compensation; and, again, assuming that such a question has arisen, there is another condition by which the jurisdiction may or may not be ousted, namely, that the question has not been settled by agreement. Therefore, in order that the sub-section may apply, a question must have arisen, and it must not have been settled by agreement. The point was, as I have said, taken before the county court judge that in this case no question had ever arisen, and therefore there was no subject-matter for arbitration. I think that, upon the admitted facts of this case, no question ever did arise; because, on the workman sustaining the injury, the employers commenced and continued to pay to him weekly all that he could possibly be entitled to by way of compensation under the Act. They never disputed his right to such compensation, and he, of course, received it without objection. Under the circumstances of this case, I do not think that any point as to whether the question had been settled by an agreement to pay compensation really arises for discussion, because there never was any question between the parties. The weekly payments being continued, as I have stated, on April 10 the respondent's solicitor writes giving formal notice of the claim for compensation. On the 12th the insurance company, who represent the employers for this purpose, reply, not denying liability, and suggesting a settlement for a lump sum. This was a mere voluntary offer by them made within six months of the accident, and therefore before any steps could be taken by them under s. 13 of Sched. I. to have a lump

sum fixed. On the 17th the respondent's solicitor writes, offering to take 75*l.*, and 5*l.* 5*s.* for his costs. On the 19th the insurance company write that, having regard to the allowances already paid, they cannot agree to pay so large a sum, and stating that they will arrange for a medical examination, and will continue weekly payments during incapacity. That letter is an express offer of everything that the workman could possibly get by arbitration. On the 24th the request for arbitration was filed. On the 25th the insurance company write again, stating that they have received a medical report, from which it would appear that a medical examination had taken place as provided for by Sched. I., s. 11, of the Act, and offering to settle for a lump sum of 15*l.*, and 5*l.* 5*s.* for the solicitor's costs. The respondent's solicitor declines that offer. On the 26th the insurance company write a letter in which they express surprise that, under the circumstances, the request for arbitration should have been filed, and state that they are quite prepared to have a memorandum filed, but call attention to the fact that an effective agreement to pay compensation according to the Act is in force. I pause here to observe that, under Sched II., s. 8, of the Act, to which we have been referred, there is a provision which can be called into play, where the workman is not contented to rest on the fact that no question has been raised as to his claim, and desires to have a judicial record of his right. By that section it is provided that, where the amount of compensation under the Act shall have been ascertained, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, by the committee or arbitrator, or by any party interested, to the registrar of the county court, who is to record it in a special register without fee. That is an important provision with reference to the facts of this case as shewing the scheme of the Act to be that the workman shall get compensation with as little expense as possible. Let us consider what was the position of the parties, while the employers were making a practice of paying these weekly amounts to the workman, there being no question raised by them as to their liability, or as to the

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amount or duration of compensation. I will assume for this purpose that there was no actual agreement by the employers to pay compensation, that there was merely a practice by them of making these payments, which had not crystallised into an actual agreement. If the workman gave notice that he proposed to send in for registration a memorandum of an agreement for payment of these amounts weekly during incapacity as compensation, and the employers were to say that there was no such agreement, then it appears to me that at once there would be a dispute, and a question would have arisen within s. 1, sub-s. 3; but nothing of the sort took place here. If a workman desired that his right to the weekly payments, which the employers had been in fact paying without question, should be legally formulated, he could, I think, in practice, the employers not objecting, obtain that object inexpensively under this provision, which entitles him to have a memorandum registered without payment of any fee. The position, then, of affairs as between the parties being what I have stated, was the respondent justified in taking proceedings for arbitration and for obtaining an award? In my opinion he clearly was not. If we were to hold that he was, I think we should be putting a construction on the Act which would invite parties in such cases to incur useless costs. I think that the respondent had no right to go to arbitration, because no question existed between the parties when the request for arbitration was filed. I cannot agree with the contention that the request for arbitration in itself creates a question, because the section in terms provides that a question must have arisen as to the liability to pay compensation, or as to the amount or duration thereof, before the provisions as to arbitration come into play. In this case no such question existed.

It was contended by the appellants' counsel alternatively that there had in this case been an agreement by which all questions were settled, and which ousted the jurisdiction of the county court judge. As I have said, I do not think that it is really necessary to consider that point; but, as I have formed an opinion upon it, I will express it. I think that, having regard to the terms of the correspondence and the conduct of

the parties, particularly that of the employers in demanding a medical examination under Sched. I., s. 11, which amounted I think to a clear admission of liability by them, and that of the workman in submitting to that examination, there was conclusive evidence, if the question had arisen, of the existence of an agreement. But in this case that point does not appear to me to arise, and I do not decide the case upon it, but on the ground that no question had arisen within s. 1, sub-s. 3, and that the existence of such a question was a condition precedent to the right to invoke the jurisdiction of the county court judge.

STIRLING L.J. I am of the same opinion. The point was taken in the county court by the advocate who appeared for the employers that there was no question to arbitrate upon, inasmuch as the respondent had been regularly and fully paid ever since the accident. The advocate for the respondent did not deny the allegation that there was no dispute, but said that his client was entitled to have a formal finding by the arbitrator recorded for him. The county court judge held that he was so entitled. The question on this appeal is whether the county court judge was right in that conclusion. It seems to me that under s. 1, sub-s. 3, of the Act it is a condition precedent to the existence of the jurisdiction of the arbitrator that there should be such a question as is mentioned in the sub-section. I cannot agree with the contention that the moment a claim for compensation is made, a question arises. The words of the sub-section, which are "if any question arises in any proceedings under this Act," imply that proceedings may take place under the Act without any question arising. The proceedings commence when notice of the accident and of a claim is given. It appears to me to be contemplated by the sub-section that those proceedings may go on to a conclusion without dispute, and that resort is only to be had to arbitration as a mode of solving a question, if it arises during the proceedings. The nature of the question which is to be so solved is indicated by the sub-section: it must be as to one of three things, namely,

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Stirling L.J.

the liability to pay compensation under the Act (including the question as to whether the employment is one to which the Act applies), or as to the amount or duration of the compensation under the Act. From the correspondence in this case it appears that the liability to pay compensation was throughout admitted; at any rate on April 19, if not before, the employers admitted that the workman was entitled during incapacity to the maximum amount of compensation which he could possibly obtain under the Act; for by the letter of that date they offer to continue payment weekly of half the amount of his wages during the period of his incapacity. Therefore all the points are covered with reference to which there may be a question under the sub-section. In these circumstances I think that the county court judge ought to have held that he had no jurisdiction on the ground that there was no question for arbitration under the sub-section. The Workmen's Compensation Act was intended for the benefit of workmen, not for that of the legal profession. No doubt there has unfortunately been a good deal of litigation under the Act, but I do not think we ought, unless absolutely compelled by the language used, to put such a construction upon it as to convert it into a perennial source of litigation and needless expense.

MATHEW L.J. I entirely agree with the concluding observation of my brother Stirling. The ground upon which I base my decision may be stated in a few words. We have to look at s. 1, sub-s. 3, of the Act, in order to ascertain the conditions under which the jurisdiction of the arbitrator under that sub-section arises; and then to consider whether those conditions existed in the present case. It is perfectly clear that one of those conditions is that there should be a question as to liability to pay, or as to the amount or duration of, compensation under the Act. It is equally clear that in this case there was really no such question. With regard to the alternative contention made by the appellants' counsel, namely, that there was an agreement in this case by which all questions as to compensation were settled, I think that on the evidence we might hold that there was such an agreement; but it is quite sufficient for the

purpose of deciding the case to say that there was no question such as is contemplated by sub-s. 3. Where this is the case, the employer ought not to be put to the expense of arbitration. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Steadman & Van Praagh, for Arthur Neal, Sheffield.*

Solicitors for respondent: *Halses, Trustram & Co., for A. Muir Wilson, Sheffield.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1901 *Nov.* 6.

AYRES *v.* BUCKERIDGE.
WHEALE *v.* THE RHYMNEY IRON COMPANY, LIMITED.
JONES *v.* THE RHYMNEY IRON COMPANY, LIMITED.

Employer and Workman—Compensation—Employment for less than Two Weeks—Mode of arriving at Sum to be Awarded—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I. s.* 1 (*a*), (*i.*); *s.* 1 (*b*).

On an application for an award of compensation under the Workmen's Compensation Act, 1897, in the case of a workman who had met with his death from an accident occurring in the course of his employment, it was proved that the deceased had been promised work for sixty hours a week at a given rate of wages per hour, but that he was liable to be dismissed at an hour's notice. He actually worked for four days, and the accident which caused his death happened on the fourth day. The county court judge awarded the maximum compensation on the basis of an employment to work sixty hours a week at the agreed rate of wages per hour:—

Held, that it was a fair inference from the terms of the engagement that the employment was not casual, but was to continue from week to week; and that the county court judge was therefore entitled to treat the deceased as a person whose standard of wages at the time he met with the accident was sixty hours a week at the agreed rate of wages per hour; and that the award must stand.

On an application for an award of compensation under the Workmen's Compensation Act, 1897, in the case of a workman who had met with an accident in the course of his employment, it was proved that the applicant had worked from Wednesday in one week up to and including Wednesday in the next week, and that he then met with an accident

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which incapacitated him. The county court judge awarded a weekly payment calculated on the basis of an employment to work six days a week at the agreed rate of wages per day:—

Held, that the county court judge was not bound to divide the actual sum earned by the applicant by 2 so as to average the amount by reference to the two weeks in which it was earned, but that he was entitled on the evidence to arrive at the conclusion that the average weekly earnings of the applicant, had he had the opportunity of earning wages in two or more weeks, would have been six times the amount of the agreed daily wages, and that the award must stand.

APPEALS from decisions of judges of county courts on applications for compensation under the Workmen's Compensation Act, 1897.

In the first case, *Ayres* v. *Buckeridge*, the appeal was from a decision of the judge of the Brentford County Court.

The application for compensation was made by the personal representative of Francis Ayres, who was a workman in the employment of the respondent Buckeridge. The deceased workman left a widow and four children, who were wholly dependent on his earnings at the time of his death. He was employed in demolishing a house at Ealing, and the accident that caused his death happened on the fourth day of his employment, which was May 3, 1899. It appeared that he had been working at Whitechapel, and that as an inducement to him and others to work on the job at Ealing, which would involve a change of residence, they had been promised employment for sixty hours a week—that is, for five hours on Saturday and for eleven hours on other days of the week. It was given in evidence that the men in the employment of the respondent were subject to dismissal at one hour's notice, and that the number of hours for which the men were employed depended on the class of work they were employed on. It was further given in evidence that when necessary the deceased would have been put to other work, and that the hours of employment on other work would be less than sixty hours a week. The actual earnings of the deceased for four days of eleven hours each at the agreed wages of 7½*d.* an hour amounted to 1*l.* 7*s.* 6*d.* The earnings at the same rate of pay for sixty hours in the week would be 1*l.* 17*s.* 6*d.* The county court judge took this

latter figure as the basis of his award, and awarded the maximum sum of 292*l.* 10*s.* as compensation.

In the second case, *Wheale* v. *Rhymney Iron Co.*, the appeal was from a decision of the judge of the Tredegar County Court. The applicant was a haulier in the employment of the respondent company; he was engaged on Wednesday, August 29, 1900, and he worked that day and continuously, including Sunday, up to and including the following Wednesday. On that day he was injured while in the course of his employment. His wages were 5*s.* 2*d.* a day. The total earnings for the eight days were 2*l.* 1*s.* 4*d.* The earnings for a week of six days at the rate of 5*s.* 2*d.* a day would be 31*s.*, and the award was for a weekly payment of half that sum.

In the third case, *Jones* v. *Rhymney Iron Co.*, the appeal was from a decision of the judge of the Tredegar County Court. The applicant was a haulier in the employment of the respondent company. He was engaged on Tuesday, September 4, 1900, and worked on week-days up to and including Wednesday in the following week. On that day he was injured while in the course of his employment. His wages were 5*s.* 2*d.* a day. The earnings for a week of six days at the rate of 5*s.* 2*d.* a day would be 31*s.*, and the award was for a weekly payment of half that sum.

The employers appealed in each case.

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Atherley Jones, *K.C.*, and *Henry Kisch*, for the employers. The employment in this case was not for a week, but at the agreed rate per hour for the number of hours' work in each week. The workman had earned four days' wages and no more, and his actual earnings for the week should have been taken as the basis of the award. Further, this was an exceptional employment, since the general hours of work were shewn to be less than sixty per week. The award is also excessive, as it is based on a continuous employment for every working hour and day, without any consideration of any break in the continuity of the work.

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[They cited *Lysons* v. *Knowles* (1), *Hathaway* v. *Argus Printing Co.* (2), and *Williams* v. *Poulson.* (3)]

Bray, K.C., and *W. M. Thompson*, for the applicant. The contract between the workman and his employers was for a weekly wage computed on the sixty hours per week that the man was to work, and the award cannot properly be based, as suggested, on the amount that he actually received, for that would be to introduce daily instead of weekly earnings. It is not a material circumstance that he could be dismissed at any time. Under the decision of the House of Lords in *Lysons* v. *Knowles* (1), where there is no means of arriving at weekly earnings by taking the average of two or more weeks, the materials at hand are to be taken into consideration. The materials in the case are evidence of employment for a week and the weekly wage computed on work for sixty hours a week. On these materials the county court judge was justified in making the award.

Atherley Jones, K.C., in reply.

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Ruegg, K.C., and *Anton Bertram*, for the employers. The applicant earned wages in two weeks, and his average weekly earnings can therefore be arrived at by dividing by 2 the sum he received. The award is for 50 per cent. of six times the daily wages, instead of 50 per cent. of the average weekly earnings. The decision of the House of Lords in *Lysons* v. *Knowles* (1) amounts to this—that if there is employment either for two full weeks, or for parts of two weeks, the amounts earned in the two weeks must be added together and divided by 2. If that principle cannot be applied, then it was said that some other method must be found to arrive at the weekly earnings. The principle can be applied in this case, and it is not necessary to look for any other. This view is confirmed by the order of the House of Lords in *Lysons* v. *Knowles* (1), for the award made by the county court judge was reduced. He had taken 12*s.*, that is the earnings for two days at 6*s.* a

(1) [1901] A. C. 79. (2) [1901] 1 K. B. 96.
(3) (1899) 16 Times L. R. 42.

day, as the weekly wage; half of that would be 6*s*., and four weeks were in arrear; so that he awarded 24*s*. The House of Lords cut down the amount to one-half, and that could only be arrived at by taking the 12*s*. actually earned as spread over two weeks and not as earned in one. The actual order made is expressed in the note to the report and not in the order there printed, where the figures are reversed.

[They cited, in addition to cases already referred to, *Keast* v. *Barrow Hematite Steel Co.* (1), *Cadzow Coal Co.* v. *Gaffney* (2), and *Illingworth* v. *Walmsley*. (3)]

Atherley Jones, *K.C.*, and *R. E. Vaughan Williams*, for the applicant. There is nothing in the Act and there is no authority to shew that the week to be taken into consideration is a calendar week. If a week is considered as a period of seven days, commencing on any day of the week and including of course a Sunday, it is apparent that in this case a week's earnings are ascertained by taking six times the daily wages, and the judge was entitled to take the sum so arrived at as the average weekly earnings. There are difficulties in the way of taking parts of two weeks and treating each part as if it were a week in itself. As to the difficulty that arises on the alteration of the county court judge's order in *Lysons* v. *Knowles* (4), if that order is antagonistic to the judgment, the principle which governs the latter should be acted on. Such cases as *Williams* v. *Poulson* (5) and *Keast* v. *Barrow Hematite Steel Co.* (1) have no application unless there is continuity of service—that is, they do not apply when, as in this case, the service has come to an end.

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Ruegg, *K.C.*, and *Anton Bertram*, for the employers.

Abel Thomas, *K.C.*, and *R. E. Vaughan Williams*, for the

(1) (1899) 15 Times L. R. 141.

(2) (1900) 3 F. 72.

(3) [1900] 2 Q. B. 142. With reference to the decision in that case, it should be noted that the report of the judgment of Collins L.J. in *Pomphrey* v. *Southwark Press*, [1901] 1 K. B. 86, should be amended by striking out the words, "The maximum that can be awarded is one-half the difference so ascertained," which occur on page 91, line 11.

(4) [1901] A. C. 79.

(5) 16 Times L. R. 42.

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applicant. In common sense, weekly earnings do not mean an amount earned in two days. In this case there were two sums: the amount earned in a week of six days, and the amount subsequently earned in two days. Before *Lysons* v. *Knowles* (1) was heard in the House of Lords, and it was decided that employment for two weeks was not necessary, several cases were decided in the Court of Appeal in which the employment was treated, in the interest of the workman, as extending into two weeks, but the necessity for doing that has now ceased.

Ruegg, K.C., in reply, on the last two cases. It is immaterial in these cases to the argument for the employers whether a calendar week, a trade week, or a consecutive period of seven days be taken. The employment has extended beyond a week however a week is defined, and has extended into a second week; so that the average weekly earnings can be ascertained from the actual amount received by the workman.

COLLINS M.R. These cases raise nearly the same point upon the construction of the Workmen's Compensation Act. The delay, since the actual decision of *Lysons* v. *Knowles* (1), has arisen because it was hoped that the House of Lords would give some further directions in that case as to the mode of assessing compensation. It has now been ascertained that the House of Lords will not add anything to what they have already decided, and so these cases have come on for discussion in this Court.

Dealing with the first of them—*Ayres* v. *Buckeridge*—it is an application on behalf of dependants, in a case in which the death of a workman occurred as the result of an accident, and the question is, What is the compensation that should be awarded? The facts were that the deceased was employed under circumstances which might fairly raise the inference, which I think was drawn by the learned county court judge, that the employment was to continue from week to week. There were special terms arranged whereby he was to have work for sixty hours a week, and, having regard to the fact which further appears that

(1) [1901] A. C. 79.

he was living at that time at some considerble distance from this particular work, there is no doubt that special terms were made with him which raised the inference that he was to be employed for a week, and made it probable that he would be continued in the employment at that rate. There is no doubt that he was liable to be discharged, and could dis-discharge himself, at an hour's notice, but still he was to be employed for a week. In fact, the deceased worked for four days, including the day of his death. There was, therefore, no complete week of work—still less was there a completed period of a fortnight. Under these circumstances, having regard to the decision of the House of Lords in *Lysons* v. *Knowles* (1), which has got rid of the contention that there must be at least two weeks' employment in order to get a weekly average, we have to fall back upon the principles laid down in that case, and use the materials at our disposal to find what is the measure of the compensation to be awarded under the Act. The Act does not provide for complete compensation such as would be given in cases of negligence where the person who is negligent has to give what, in the opinion of a jury, is full and complete compensation to the person injured for the injuries sustained. That is apparently not the scheme of the Act, because two cardinal features of the Act are—that there is no need that the accident should have happened through negligence on the part of the employer, and in the next place a nexus, between the person injured and the particular employer in whose employment he was at the time of the accident, is established, and the compensation is measured by the earnings in the employment of that particular employer. The problem is to find out what we are justified in supposing those earnings would have been. The Legislature has given a comparatively easy mode of ascertaining that, where the facts admit the taking into consideration employment extending over a number of weeks, for if the number of weeks during which the man was employed is ascertained, and his earnings divided by that figure, the result will be the average weekly earnings.

The clause under which the question arises in this case is

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s. 1 (i.) of the 1st schedule to the Act. The amount of compensation, if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, is to be, if the period of the workman's employment by the same employer has not extended to three years preceding the injury, an amount arrived at by taking 156 times his average weekly earnings during the period of his actual employment under the same employer. In this case we have not got actual employment for more than four days, and we cannot in strictness apply the rule laid down in the schedule. We cannot find two or more weeks of employment during which he had the opportunity of earning and did earn something. In these circumstances, on the principle laid down in *Lysons* v. *Knowles* (1), the man is still within the Act, and entitled to compensation, and we have to find out what that compensation is, and must use in determining it such materials as are before us. Can we on those materials say what this man's average weekly earnings would have been? We have actual service for four days, and a term of the service that the workman should serve for a full week. We are not hampered by the fact that he did not earn a full week's wage—that is not material. The average must be arrived at by taking the actual facts, and from them arriving at a hypothetical sum, because we have not the materials to arrive at anything else. It seems to me to be clear that the county court judge was entitled to treat the deceased as a person whose standard of wages at the time he died was sixty hours a week at a given sum per hour. The result is that the judge on that basis has computed the weekly wage, and multiplied it by the 156 mentioned in the section, and awarded the full amount. That seems to me a perfectly correct method of arriving at the amount of compensation to be awarded, and quite in accordance with the law laid down in the House of Lords.

Then comes the only other question discussed in the case, on the suggestion that the learned county court judge ought not to have given compensation on the basis of the man working sixty hours a week for the whole time. That, however,

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was matter for the county court judge to determine. He is limited as to the maximum amount to be awarded; but it was entirely within his discretion, on the materials before him, whether he would make any deduction in view of the possibility of the man not being able to earn in every week wages for the full sixty hours. I do not find that the learned judge misdirected himself in any respect; and the conclusion at which I arrive is that the appeal should be dismissed.

In the second of the cases before us, *Wheale* v. *Rhymney Iron Co.*, the applicant for compensation was a workman who was injured. He had worked from Wednesday, August 29, up to and including the following Wednesday, September 5 (including Sunday), and making a period of eight days. His wages were 5*s.* 2*d.* a day, and compensation has been awarded to him on the footing of a week of six days at 5*s.* 2*d.* a day—that is to say, at the rate of 1*l.* 11*s.* a week, the award being of half that amount per week. It was contended that the workman was employed in two weeks, and that the amount he actually earned should be divided by 2, so as to average the amount by reference to the two weeks in which it was earned. The question is whether we are bound to do this. The employment had no relation to a calendar week, and, indeed, there is no provision in the statute that calendar weeks must be taken. Apart from that consideration, it seems to me, when you introduce the principle laid down in *Lysons* v. *Knowles* (1), that you are proceeding on an entirely false hypothesis if you try to measure the compensation, where the period of work has been less than two actual weeks, by the standard of actual facts only. To do so is to confound the actual with the hypothetical. Where you have the actual fact of two weeks expired you have history, and you have the accomplished facts of history, and upon them you can base your calculations according to the rule of the schedule. But where you have not two whole weeks, then you are just in the same position in point of law, it seems to me, as if you had only a week or less; you must use the actual as a step to the hypothetical, and not as itself measuring the whole possible earnings. In other words, you

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are obliged to use the materials before you in forming a conclusion as to what he would have earned had he had the opportunity, which he never had, of accomplishing two complete weeks. We are bound to find, on the same principle as in the last case, what is the sum which, having regard to the intention of the Legislature in passing the Act, this man must be taken to have lost per week, that he would have earned in the employment of the particular employer. Now, being entirely emancipated from the necessity of finding an average in fact, the contention is obviously wrong that we must treat the sum earned in a given fraction of a week as the week's earnings of the man. We are entirely emancipated from that, and we can, as in the former case, come to a conclusion, and say what we may suppose would have been the earnings of the man in a week, or, to put it as I think is better, what would have been his earnings, taking one week with another, had he had an opportunity of earning wages during two weeks or more.

In this case the county court judge had before him the fact that the man had been in employment during eight consecutive days, and in that time had received so much per diem. It seems to me that there was abundant material for him to arrive at the conclusion that the amount per week which this man was entitled to expect he would have earned in this service, had he had the opportunity, was the sum which the county court judge has taken—namely, six times the daily wage of 5*s*. 2*d*.

The same reasoning applies to the third case, *Jones* v. *Rhymney Iron Co.*; but a difficulty was raised, and, in my opinion, it is a real difficulty, that the House of Lords in *Lysons* v. *Knowles* (1), though they affirmed the principle that there was no necessity for the existence of an employment of two weeks, did in fact modify the finding of the county court judge, by substituting an order based on the hypothesis that the labourer in that case had worked for parts of two weeks, and by that substituted order reduced the amount awarded by the county court judge, on the hypothesis that the man had worked in one week only. In that case the man had worked

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for two days, one within one colliery week and the other within the next, there being evidence as to the days on which the colliery week began and ended. But the fact was found in the case, and it was argued on the hypothesis, that the man was in no sense a weekly labourer. He was a person employed for one day, and there was no inference that he would have worked for more days in the same week in which he worked one day had he had the opportunity. There was, therefore, only the fact of a man working on two isolated occasions not sufficiently separated to prevent their evidencing a continuous employment, within the meaning of the cases decided on this Act, and which could be so treated. But the amount earned was divided by 2 because each day was in fact separated from the other by the custom of the colliery, so as to be in a different week, and there was no presumption of more than a day's labour in any week. On this view it would not be inconsistent with the main decision that the award of the county court judge should have been modified by taking the wages of the man as 6*s.* in each week, and not 12*s.* in one week. It seems to me, therefore, that there is nothing to countenance the view that in this case we are obliged to divide the total sum received by the workman by 2 because, in point of fact, the whole period during which the man was employed covers parts of two different weeks. For the reasons I have given, I do not think that is a sound principle, unless we are bound by a decision of the House of Lords to that effect; and I think, on consideration, that the order made in that case can be explained on the ground that I have stated, and does not conflict with the main decision.

I wish to make one general observation on some of the cases decided in this Court on the question of weekly earnings before the decision in *Lysons* v. *Knowles*. (1) So far as they are inconsistent with that decision they are of no authority, having been decided on the footing of its being a condition of compensation that the workman should shew actual employment in two weeks. The cases were dealt with on that hypothesis, and the Court was willing so to treat them, in favour of the

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workman, because by that means only was he put in a position which enabled him to receive compensation by means of an average being struck. Any argument based on those cases, as establishing the proposition that the period of employment ought to be divided so as to extend into two weeks, may now be put aside. It is quite obvious that it was for the benefit of the workman that his employment should be treated as extending into two weeks, and the Court were willing not to cut down the operation of the Act by insisting on the opposite view.

The conclusion at which I arrive is that this appeal also fails, and the result is that all three appeals will be dismissed.

STIRLING L.J. I agree. In these cases we have to consider what meaning is to be attached to the expression "average weekly earnings," which occurs in the 1st section of the schedule of the Workmen's Compensation Act, where that expression cannot receive its ordinary meaning. In dealing with this point we must construe the Act by the light which is thrown upon it by the decision of the House of Lords in the case of *Lysons* v. *Knowles*. (1) In that case two things were held. First of all, that the general enactment which is found at the beginning of the Act is not limited in its operation by the circumstance that the particular case does not fall within the terms of the schedule. The Lord Chancellor says, for example: "If I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had been first granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained." Therefore, if it turns out that the case which comes before us is not found to be provided for in the schedule, there is still compensation to be awarded, and to be ascertained, by analogy no doubt, from the directions which are found in the schedule itself. But, secondly, the word "average" was much considered by the House of Lords, and it was the opinion of all the noble Lords who advised the House that the word was used

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in a loose and popular sense, and is not to be treated as used in a strict sense. Here again I will read a few words from the speech of the Lord Chancellor. He says: "I do not myself feel very much impressed by the discussion that we have had as to what the word 'average' strictly means. I think in ordinary popular parlance when you talk of a man, if he has earned irregular wages, whether unequal wages or equal wages, you would say, speaking of a yearly servant, that on the average he got so much a week or so much a month, as the case might be. I think it was in that popular sense, taking one day with another or one week with another, that the Legislature used those words, and I think it is what everybody would understand by 'average' that his earnings were so much—not his agreed earnings by contract, there it would be definite—that if a man was only employed at irregular intervals or at irregular amounts you were to get at what the average was by putting them together and striking an average, so as to afford a test of the weekly sum to be paid." It is in that way that the word "average" is to be read—not in the strict sense. In the first of these cases we have the case of a workman employed under contract, in which it seems to me, and I think the learned county court judge so found, he was to be employed for a week at a certain rate per hour per day. He only worked four days, and then met with an accident on the fourth day. How in that case is the average weekly wage to be ascertained? If we apply to that expression the meaning attached to it by the Lord Chancellor in the passage which I have read, we have to answer the question, What in ordinary parlance would be the sum the man was earning per week? From that point of view the answer to the question is easy, and it must be that which the county court judge has given.

In the second and third cases we find that the workman entered on the employment and worked for eight days at so much per day. Again, the fortnight not being completed, we do not in strictness get a weekly average; but if we put the same question as in the former case, there is no difficulty in arriving at the same conclusion as the learned county court judge.

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Against this there was very properly pressed upon us the decision of the Scottish Court in *Cadzow Coal Co.* v. *Gaffney* (1), in which it was laid down that the word "earnings" throughout this section of the Act means "actual earnings." The decision is entitled to great respect, and, I think, Lord Shand in *Lysons* v. *Knowles* (2) expressed an opinion to a similar effect, and no doubt that also is of great weight. Upon a case such as this one would hesitate to express a contrary opinion. But it seems to me the better view is arrived at upon consideration of what was laid down by the Lord Chancellor—from which none of the other learned Law Lords differed; and I agree, therefore, in the opinion expressed by the Master of the Rolls.

MATHEW L.J. In the first case it is clear the duty was imposed upon the learned county court judge, if he could, to ascertain what the average weekly earnings of the deceased amounted to. Having to answer that question, the first inquiry that would in the ordinary course arise would be this: Was there any contract between the workman and his employer? The answer in this case would be that there was a contract, that the workman was to be employed for a week, and was to earn in that week so much money. There was fair ground for the inference that his average weekly earnings would be about the same. No reason was suggested why the learned county court judge should come to any different conclusion; he acted upon that view, and, as appears by the passage in the judgment of the Lord Chancellor which my brother Stirling read, he would seem to be justified in doing so.

I do not know where the county court judges would be if they were not entitled to act upon proof of contract between employer and employed for the purpose of seeing what the man's earnings were. The assumption that they were his ordinary earnings would be perfectly legitimate in the absence of proof to the contrary. There was no reason for supposing that the employment would not be continuous.

Take the other two cases. The position of the workmen in them seems to be analogous to the position of the workman in

(1) 3 F. 72. (2) [1901] A. C. 79, at p. 95.

the first case. There is a course of business, and it is certain if the man can work he will work for a time beyond the two weeks which have been referred to. In each of these two cases the workman had entered upon the second week. Now, it is said that we are constrained by the language of the schedule to come to the conclusion that, if the man had been injured at the end of the first week, his compensation would be higher than if he were injured at the end of the first few days of the second week. It is said that in this latter event we are bound to put the two sums together which were so earned, and to divide the result by 2. It is obvious that by doing this we should not arrive at what the weekly earnings of the man would be, but should cut them down to less than the actual amount.

I agree with my learned brothers that the appeals must be dismissed. I should like to add that it has been pointed out as an explanation of the order of the House of Lords in *Lysons* v. *Knowles* (1) that the employment might have been irregular and for one day only in each week.

Appeals dismissed.

Solicitors for applicants: *Griffith & Gardiner; Holt-Beever & Co., for D. Evans, Brecon.*

Solicitors for employers: *Beyfus & Beyfus; H. P. Becher, for Simons & Powell, Pontypridd.*

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[IN THE COURT OF APPEAL.]

BARTLETT *v.* TUTTON & SONS.

Employer and Workman—Compensation—Incapacity resulting from Injury—Casual Employment—Accident on First Day of Employment—Mode of arriving at Amount of Award—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *First Schedule*, 1 (*b*).

On an application for compensation under the Workmen's Compensation Act, 1897, it was proved that the applicant, a casual dock labourer, who had not been previously employed by the respondents, was engaged for a day at a certain rate of wages per hour, but subject to discharge on an hour's notice. He met with an accident in the course of that day. The county court judge took into consideration the average weekly earnings of a labourer such as the applicant, taking one week with another, by whomsoever employed, and awarded a weekly payment of half that sum. On appeal:—

Held, that this mode of arriving at the amount of compensation to be awarded was erroneous, as it was not based upon the period during which the applicant had been in the employment of the same employer as required by the schedule to the Act.

APPEAL from a decision of the judge of the Bristol County Court on an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was a casual dock labourer, and at the time of the accident, on January 2, 1900, he was employed by the respondents, Messrs. Tutton & Sons, who were stevedores. He had not previously been employed by them, and he was engaged for the day, but was subject to dismissal at an hour's notice. The wages to be paid to him were at the rate of 6*d.* an hour, and the hours of work were from 8 A.M. to 4 P.M. He had been working for some time on the first day of his employment when he met with an accident which incapacitated him. His actual earnings, computed by the time that he had worked, were 3*s.* 3*d.* Liability to pay compensation was not disputed. The contention on behalf of the applicant was that to arrive at the amount of compensation the hourly wage of 6*d.* should be multiplied by the number of working hours in a week, so as to arrive at the applicant's average weekly earnings. The learned judge rejected this view, because the applicant, if he had met

with no accident, might not have been again employed by the respondents, or at all, during the week following January 2. The contention on behalf of the respondents was that, as 3*s.* 3*d.* was the sum actually earned by the applicant in the employment of the respondents, the Act precluded an award of more than half that sum per week as compensatiom. The learned judge rejected that contention on the ground that he ought not to make a nugatory and illusory award by fixing a weekly payment so small as to be in no sense a maintenance for the applicant, or any real compensation for the loss of his wage-earning powers. As it appeared to be impossible to arrive at the "average weekly earnings" of a labourer in the employment of the same employer where there was only the single instance of his pay for casual work during part of a day, and the schedule to the Act was inapplicable to such a case, the learned judge estimated the weekly earnings of a casual dock labourer in the port of Bristol, which he found to be, taking one week with another, 18*s.*; and he awarded a sum of 9*s.* a week from January 17, 1900.

The employers appealed.

Ruegg, *K.C.*, and *C. H. Gregory*, for the employers. There is no warrant in the case of a casual labourer for taking anything but his actual earnings as the basis for an award. The award made in this case brings in earnings which the injured man might have made in casual employment under different employers, and is not restricted to the earnings in the respondents' employment.

Foote, *K.C.*, and *Clavell Salter*, for the applicant. The decision of the House of Lords in *Lysons* v. *Knowles* (1) shews that the word "average" need not be taken into consideration in cases where "average weekly earnings" cannot be ascertained. In such cases the principle laid down is that some other means must be taken to arrive at an award than those supplied by the schedule; but that by some means compensation is to be arrived at. If compensation cannot be arrived at by the means indicated in the schedule, the award should be

(1) [1901] A. C. 79.

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made independently of the schedule. If the word "average" could be excluded in one case in arriving at compensation, it is legitimate to go a step further and disregard the provision as to employment by the same employer, if in no other way can compensation be given. If this were not so, a man injured in the first hour of his work would not be within the Act because he had earned nothing. A refusal of compensation and an award of illusory compensation must stand on the same footing. The county court judge was, therefore, justified in treating the schedule as altogether inapplicable, and arriving at the amount of compensation by the best means at his disposal.

Ruegg, K.C., in reply.

COLLINS M.R. I am of opinion that this award cannot be supported. The learned judge has pushed home to a logical result a theory based on the decision of the House of Lords in *Lysons* v. *Knowles*. (1) I do not think, however, that the facts of this case bring it to the extreme position to which some of the learned Lords referred, in which it could be said that there was no provision in the Act for calculating the compensation, which the Act no doubt intended should be given. The case is that of a casual dock labourer, who met with an accident in the course of his employment. The learned county court judge states in his notes that the applicant, if he had met with no accident, might not again have been employed by the respondents during the week, or at all; so that it appears that the workman was a person as to whom there was no presumption that his employment was to last longer than the time required to unload the particular ship. He had worked for some time on the first day of his employment before he met with an accident, and his earnings for the time that he worked were 3*s.* 3*d.* It was contended on the one side that all that it was competent for the learned judge to award by way of compensation was a weekly payment of one-half of that sum. On the other side it was said that the hourly wage of 6*d.* should be multiplied by the number of working hours in a week to get at the average

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weekly earnings, and that the award should be for half the sum so arrived at. Both these contentions were rejected, the latter on the ground that the applicant might not have been continued in the employment of the respondents, and the former on the ground that it would result in an amount of compensation so illusory that it could not be properly treated as compensation. The learned county court judge, therefore, adopted as the basis of his award the ordinary standard of wages of a dock labourer in the port of Bristol throughout the year. Adopting that standard involves this proposition—that the workman is entitled to compensation in respect of wages other than those that he received or would receive from the employer in whose service he was at the time of the accident. That is, in effect, to rule out of s. 1 (*b*) of the schedule the words "during which he has been in the employment of the same employer," which are to the same effect as the words of s. 1 (*a*), "during the period of his actual employment under the said employer." It seems to me that those words shew that, in determining the amount of compensation to be awarded, a cardinal factor is the rate of weekly wages which he received or might be deemed likely to receive in the employment of the same employer. That principle appears to me to be a vital one. It limits the liability of the employer to the standard of wages that he paid, or would have paid one week with another, to the injured workman while in his employment. Where there is no antecedent employment by the same employer from which average weekly earnings can be arrived at, the workman is still entitled to compensation though the word average in the schedule is not applicable. We have to apply the materials before us to ascertain what the workman has lost by his inability to be further employed by the same employer. That must depend on the terms on which the workman was employed, and the number of days in which he would be employed in a week. We cannot take into consideration employment under any other employer. In this case, treating the provisions of the schedule on the principles laid down by the House of Lords in *Lysons* v. *Knowles* (1),

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it is possible to form an estimate of the loss to the workman, but it must be an estimate of the loss to him in the employment of the same employer. I think that the decision of the House of Lords in *Lysons* v. *Knowles* (1) practically decides this case. There a man was employed for two days, which the county court judge treated as being in one week, and compensation was assessed on that footing at a weekly payment of one-half the sum the workman had received. This was reduced by the order of the House of Lords by treating the amount that the man had received as having been earned in two weeks, and the award was consequently reduced to 3*s.* a week. It would be difficult to argue that if 3*s.* a week was not an illusory award of compensation in the case of a man earning 30*s.* a week, that an award of 1*s.* 8*d.* a week is illusory in the present case. It seems to me to be impossible for us to support the award without disregarding not merely decisions given in this Court, but also that of the House of Lords in *Lysons* v. *Knowles* (1), and the words of the statute itself, by ignoring the connection between the actual employer and the person injured. I am of opinion, therefore, that the appeal must be allowed.

STIRLING L.J. I am of the same opinion. The decision in *Lysons* v. *Knowles* (1) shews that where the provisions of the schedule can be applied the standard of compensation there laid down must be followed as far as possible. The Act contemplates compensation based on the earnings in the employment of the same employer, and that consideration is essential in arriving at the amount of compensation that can be awarded.

MATHEW L.J. I agree. Until we are released by the Legislature or by a decision of the House of Lords from following the language of the schedule we must abide by it. It is said that the result will be illusory; but I do not see that we are in a position to set that right, nor do I see what principle we could apply to such a case. The learned judge treated the matter as at large and as not turning upon the amount received

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in respect of employment by the same employer, and he arrived at his conclusion by estimating the amount that might be earned in employment by various employers. I cannot say that is a right way of arriving at the amount to be awarded, and the award cannot be supported.

Appeal allowed.

Solicitors for applicant: *Ford & Ford, for Wansbrough, Dickinson, Robinson & Tayler, Bristol.*

Solicitors for employers: *William Hurd & Son, for Fussell & Co., Bristol.*

A. M.

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED.]

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THE KING *v.* TIBBITS AND WINDUST.

Criminal Law—Perverting course of Justice—Conspiracy—Publication of Articles in Newspaper affecting Character and Conduct of Persons in course of Trial.

During the course of the trial of two persons for felony the reporter for a certain newspaper sent to the editor articles affecting the conduct and character of the persons under trial which would have been inadmissible in evidence against them. The editor published the articles, and, after the conviction and sentence of the two persons, he and the reporter were convicted on an indictment charging them with unlawfully attempting to pervert the course of justice by publishing the articles in question and with conspiring to do so:—

Held, that the conviction must be affirmed.

CASE stated for the consideration of the Court for Crown Cases Reserved by Kennedy J.

Charles John Tibbits and Charles Windust were indicted on July 12 and 13 at the summer assizes at Bristol for misdemeanour.

The indictment consisted of sixteen counts, and charged in varied forms (*a*) an unlawful attempt to obstruct and pervert the due course of law and justice, (*b*) the unlawful doing of an act calculated and tending to the same result, (*c*) the composing, printing, and publishing of matters with the same

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intent, and (*d*) a conspiracy to obstruct and pervert the due course of law and justice. (1)

The charges embodied in the indictment were based upon

(1) The distinctions between the several counts of the indictment (giving only the essential parts and omitting formal matters and prefatory averments) were thus set out in the judgment of the Court. Count 1 alleged that the accused unlawfully attempted, by the composition and publication of the statements contained in the issue of January 13, to influence and prejudice the mind of the magistrate before whom the charge against Allport and Chappell was pending, and so unlawfully attempted to obstruct and pervert the due course of law and justice. Count 2, in regard to the same publication, alleged the same offence by a similar attempt to influence, by the same publication, the minds of the jurors who might be returned and impanelled for the trial of Allport and Chappell at the assizes. Count 3 charged, in regard to the same publication, the doing knowingly and unlawfully of an act calculated and tending to obstruct and pervert the due course of law and justice when Allport and Chappell's case was before the magistrate. Count 4 was identical with count 3, except that it related to the trial of Allport and Chappell at the assizes. Count 5 charged, with regard to the same publication, that the defendants, unlawfully devising and intending to injure and prejudice Allport and Chappell and to deprive them of a fair and impartial hearing before the magistrate, unlawfully, wilfully, and maliciously printed and published and procured to be printed and published a malicious and scandalous writing. Count 6 was identical with count 5, except that it related to the trial of Allport and Chappell at the assizes. Counts 7–12 (inclusive), in substance, repeated, in regard to the issue of the *Weekly Dispatch* of February 3, the same charges as were contained in counts 1–6, in regard to the issue of January 13. There was an additional prefatory averment of the preferring on February 17 of a further charge against Allport and Chappell of attempting to murder Arthur Bertie Allport, and in counts 11 and 12 was added a charge as to the publication in the incriminated article of a scandalous representation of Allport in clerical garb. Count 13 alleged an unlawful conspiracy between Tibbits and Windust on January 9, 1901, and on divers other days between that day and January 14, 1901, to obstruct and pervert the due course of law and justice in reference to the hearing before the magistrate. Count 14 alleged the same unlawful conspiracy in reference to the trial of Allport and Chappell at the assizes. Count 15, after prefatory averments relating to the further charges against Allport and Chappell, alleged the conspiracy on January 9, 1901, and on divers days between that day and March 4, 1901, setting out the dates of publication, in reference both to the hearing before the magistrate and to the trial at the assizes. Count 16, in regard to the same dates of publication, alleged an unlawful conspiracy to compose, print, and publish articles which were calculated and intended, as the accused knew, to prejudice the minds of the committing magistrate and the jurors at the trial, and so to pervert and obstruct the due course of law and justice.

the alleged composition, printing, and the publication in Bristol, of portions of certain issues of a newspaper known as the *Weekly Dispatch* at various dates between January 13 and March 4, 1901 (inclusive). These portions consisted of statements as to the case of one David Allport and one Louisa Eleanor Chappell, and appeared in the said newspaper whilst certain charges of felony and misdemeanour against both these two persons were being heard before the magistrate at Bristol, who committed them for trial, and also before and during their trial at the assizes. The hearing before the magistrate commenced on January 1, 1901, and continued at intervals till February 8, 1901, when Allport and Chappell were committed to take their trial at the assizes. They were tried before Day J., and the trial lasted from March 1 to March 5, on which day they were convicted and sentenced.

The *Weekly Dispatch* is the property of a registered company with limited liability. Charles John Tibbits was the editor of the paper, and in that capacity communicated with the Director of Public Prosecutions when, after the trial of Allport and Chappell, enquiries were made as to the publication of the paper. Evidence was called to shew that Charles Windust was a reporter on the staff of the paper, that he styled himself "Crime Investigator" to the paper, that the articles in question purported to be written by the "Special Crime Investigator" of the paper, and that on several occasions when Allport and Chappell were before the magistrate he was seen in court taking notes of the proceedings.

Proof was also given of the sale and circulation in Bristol of the *Weekly Dispatch* containing the publications which formed the subject of the indictment, and also that the sale of the paper had considerably increased in January, February, and March, 1901.

The articles in question formed a considerable part of the issues of the paper, and contained statements making grave imputations against Allport and Chappell, evidence of which would have been inadmissible against those persons on the trial of the offence with which they were charged.

Copies of the issue of the *Weekly Dispatch* of January 13

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(which was the subject of the first six counts of the indictment) and of February 3 (which was the subject of counts 7 to 12 of the indictment) were set out in counts 1 and 7 of the indictment respectively. Copies of the issues of those dates, and also of January 20 and 27, and of February 10, 17, 24, and of March 3, were put in evidence and were annexed to the case, as also were the depositions taken before the magistrate in Allport and Chappell's case, and a copy of Kennedy J.'s notes of the evidence at the trial of Tibbits and Windust before him. Copies of the letters written by Tibbits to the Director of Public Prosecutions were also annexed to the case.

At the conclusion of the case for the prosecution the counsel for the prisoners submitted that there was no evidence on any of the counts of criminal intent, that it was not proved that any of the statements were untrue, or that either of the accused desired or intended to procure a false verdict or to alter the course of justice; he further submitted that there was no evidence to support the counts charging conspiracy; and, as to counts 5, 6, 11, and 12, he submitted that, if the printing and publishing of the articles did not constitute attempts to pervert and obstruct the course of justice, as charged in counts 3, 4, 9, and 10, they disclosed no criminal offence; further, that there was no evidence against either of the accused which would connect him with the offences charged in the indictment.

Kennedy J. held that there was evidence to go to the jury on all the counts, and, no evidence being called for the defence, he directed the jury to consider all the counts separately. The jury found both the accused guilty on each and all of the counts; and Kennedy J. reserved this case, and released the accused on their recognizances.

The question for the Court was whether all or any and which of the counts of the indictment alleged a criminal offence, and whether there was evidence adduced at the trial upon which the accused, or either and which of them, could properly be found guilty upon all or any and which of the counts in the indictment.

Foote, K.C. (*Evans Austin* with him), for the prisoners. There was no evidence to support the charges against the prisoners.

As to the counts for conspiracy, there was no evidence of any conspiracy between these two men. In *Mulcahy* v. *Reg.* (1) it was said by Willes J., in delivering the opinion of the judges, that "a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." There must, therefore, be evidence of some previous agreement in order to support a charge of conspiracy, and there was no such evidence here. The mere reception of a communication by an editor from a reporter or correspondent, and the editor's decision to publish that communication, do not amount to such an agreement. But, even assuming that there was such an agreement as was required by Willes J., there was no evidence either on the conspiracy counts of an intention to pervert the course of justice, or on the other counts of any attempt to pervert the course of justice. In *Skipworth's Case* (2) Blackburn J., in explaining what was meant by perverting the course of justice, cited (3) Lord Cottenham as saying: "It is immaterial what measures are adopted if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course." That is the sure test, and there is no evidence here, and not even any suggestion, that the defendants desired or intended to corrupt the Court, or to get a different verdict from that which ought to have been given. The Law of Conspiracy is based on the Ordinacio de Conspiratoribus, 33 Edw. 1, and the essence of conspiracy as there defined was a confederacy or alliance for doing certain things, of the character specified in that statute, *falsely*. As Wright J. observes, the modern law of conspiracy has grown out of that statute (4), and the combination must be in pari materiâ with those against which the original ordinance was directed. (5) Wright J. gives a list of cases of conspiracy

(1) (1868) L. R. 3 H. L. 306, at p. 317.
(2) (1873) L. R. 9 Q. B. 230.
(3) L. R. 9 Q. B. at p. 235.
(4) Law of Criminal Conspiracies, by R. S. Wright, 1873, p. 6.
(5) Ibid. p. 30.

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to pervert or defeat the administration of justice, in every one of which the element of falsity—that is to say, the intention to bring about a wrong result—is material. That element is entirely wanting in the present case. Had it been shewn that the intention or result of what the prisoners did was to convict an innocent or acquit a guilty man, the case would have been different; but here the conviction of Allport and Channell shews that what the prisoners did had no ill effect on the course of justice, nor did they intend that it should have an ill effect. In order to support the indictment, it must at least be shewn that the publication of the incriminated articles was calculated to pervert the course of justice. If persons desiring, as it must be assumed that the prisoners did, to convict a guilty man publish for that purpose facts about him which are inadmissible in evidence against him, they may have committed a contempt of Court or be guilty of libel, for either of which they could be indicted; but they have not conspired to pervert the course of justice, nor have they perverted it. Wright J. points out (1) that all the instances he gives of conspiracies to pervert the course of justice were punishable as contempts of Court. An article which is calculated to bring about the right result cannot be said to be calculated to pervert the course of justice.

No doubt persons must be assumed to intend the necessary and probable consequences of their own acts: *Rex* v. *Farrington* (2); *Rex* v. *Dixon* (3); *Rex* v. *Harvey* (4); but it is not a necessary or probable result of a reporter sending a communication to his editor that it will be published, nor is it a necessary or probable consequence of the editor's decision to publish these particular communications that the course of justice would be perverted. In conspiracy there must be an intention to do the wrongful thing at the time of the agreement, and the result must, therefore, be the natural consequence of the agreement, and not merely of some act done in pursuance of the agreement.

(1) Law of Criminal Conspiracies, by R. S. Wright, 1873, p. 31.
(2) (1811) Russ. & Ry. 207.
(3) (1814) 3 M. & S. 11; 15 R. R. 381.
(4) (1823) 2 B. & C. 257; 26 R. R. 337.

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[They also referred to *Reg.* v. *Grant* (1); *Rex* v. *Hicklin* (2); *Haire* v. *Wilson* (3); *Reg.* v. *Hamp* (4); *Rex* v. *Jolliffe* (5); *Crawford's Case* (6); *Rex* v. *Almon* (7); *Rex* v. *Fisher*. (8)]

The Solicitor-General (*Sir E. Carson, K.C.*), (*H. Sutton, C. W. Mathews*, and *Guy Stephenson* with him), for the Crown. The finding of the jury on all the counts of the indictment amounts to this: that by these publications the defendants have perverted the course of justice; that the articles were calculated, and were written with the intention, to have that effect, and that the two defendants conspired to pervert the course of justice.

The questions raised by the case are whether interfering with the ordinary course of justice is an offence, and whether two persons can conspire to commit such an offence, and, if so, whether that offence has been proved to have been committed in the present case.

If what has been done is only a contempt of Court, the defendants could not have been indicted, but must have been dealt with by the Court itself. The offence may be a contempt of Court and also a libel, and yet be punishable under this indictment. No distinction can be drawn as to the manner in which the course of justice may be interfered with. (9) The moment the case comes before the Court and the law is seised of it, any interference by an unauthorized person is not only a contempt of Court, but is also punishable by indictment in this way: *Rex* v. *Jolliffe* (5); *Rex* v. *Fisher* (8); *Crawford's Case* (6); *Rex* v. *Williams & Romney*. (10) This is no new doctrine, as is pointed out by Lord Russell of Killowen C.J. in *Reg.* v. *Gray* (11), where he says that if the contempt of Court is not beyond reasonable doubt the Courts will and ought to leave

(1) (1848) 7 State Trials (N.S.) 507.
(2) (1868) L. R. 3 Q. B. 360.
(3) (1829) 9 B. & C. 643; 33 R. R. 284.
(4) (1852) 6 Cox C. C. 167.
(5) (1791) 4 T. R. 285; 2 R. R. 383.
(6) (1849) 13 Q. B. 613.
(7) (1765) Notes and Opinions by Chief Justice Wilmot, 243, 252–71; see 19 How. St. Tr. 1082, n.
(8) (1811) 2 Camp. 563; 11 R. R. 799.
(9) See 2 Atk. 471.
(10) (1823) 2 L. J. (K.B.) (O.S.) 30; 26 R. R. 624.
(11) [1900] 2 Q. B. 36, at p. 41.

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the Attorney-General to proceed by criminal information. It was, therefore, right to proceed by indictment, and there was evidence to justify the finding of the jury on each count.

Foote, K.C., replied.

Cur. adv. vult.

Nov. 9. The judgment of the Court (Lord Alverstone C.J., and Wills, Grantham, Kennedy, and Ridley JJ.) was read by

LORD ALVERSTONE C.J. This was a case reserved by Kennedy J. at the last summer assizes at Bristol. Indictments were preferred against two defendants, Charles John Tibbits and Charles Windust. The indictments contained sixteen counts, upon each of which the defendants were found guilty. The charges contained in the indictment related to the publication of certain matters in a newspaper called the *Weekly Dispatch*, between January 13, 1901, and March 4, 1901 (inclusive), and particularly to the issues of that newspaper dated respectively January 13 and February 3, 1901. Prior to the publication of the first article, two persons, named Allport and Chappell, had been charged before the magistrate with offences under the Prevention of Cruelty to Children Act, 1894. Further charges of attempting to murder, and of conspiracy to murder a child named Arthur Bertie Allport, and of a conspiracy to commit the offence against s. 1 of the Prevention of Cruelty to Children Act, 1894, were preferred against them. On February 8 Allport and Chappell were committed to take their trial at the next Bristol Assizes, which had been fixed to commence on February 20. Their trial on the indictment for the attempt to murder commenced before Day J. on March 1, and terminated on March 5. They were found guilty, and sentenced, Allport to fifteen years' penal servitude and Chappell to five years' penal servitude. The publications in the *Weekly Dispatch*, which formed the subject of the present indictment against Tibbits and Windust, were statements relating to the case of Allport and Chappell, contained in the issues of the *Weekly Dispatch* during the hearing of the case against Allport and Chappell before the magistrate, and before and during the trial of these persons at the assizes. It is unnecessary to refer

in detail to any of the incriminated articles, of which those of January 13 and February 3 were the most important. It is sufficient to say that the publication went far beyond any fair and bonâ fide report of the proceedings before the magistrate. They contained, couched in a florid and sensational form, a number of statements highly detrimental to Allport and Chappell. Many of these statements related to matters as to which evidence could not have been admissible against them in any event, and purported to be the result of investigations made by the "Special Crime Investigator" of the newspaper. Under these circumstances it was contended on behalf of the prosecution that there was evidence upon which the jury might properly convict both the defendants on all the counts of the indictment. Upon the argument before us we had no doubt upon the main questions which had been discussed, but, having regard to the nature of the proceedings and the importance of the case, we thought it desirable that we should endeavour to lay down as clearly as possible the law applicable to such a case. Points were raised and argued on behalf of the defendant Windust as distinguished from the defendant Tibbits. It will be convenient to postpone the discussion of those points until we have dealt with the main questions of law raised on behalf of both prisoners. It was not attempted to be argued by Mr. Foote, who appeared as counsel for both defendants, that the publication of such articles was lawful, and that the persons publishing such articles could not be punished. On the contrary, he contended that the publication of such articles was a contempt of Court, and could only properly be punished as such either by summary proceedings or indictment for contempt. He further urged that there was no evidence of any intention on the part of either of the defendants to pervert or interfere with the course of justice, and that any inference which might otherwise be drawn from the contents of the articles, that they were calculated to pervert or interfere with the course of justice, was negatived by the fact that the defendants Allport and Chappell had been subsequently convicted. That the publication of such articles constituted a contempt of Court and could be punished as such, is well established.

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One of the sorts of contempt enumerated by Hardwicke L.C. in the year 1742 (1) is prejudicing mankind against persons before the case was heard, and he adds these important words: "There cannot be anything of greater consequence than to keep the realms of justice clear and pure that parties may proceed with safety both to themselves and their characters." The case of *Rex* v. *Jolliffe* (2) shews that a criminal information lay for distributing in the assize town, before the trial at Nisi Prius, handbills reflecting on the conduct of a prosecutor, and, in the course of his judgment in that case, Lord Kenyon made the following very relevant observations (3): "Now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecutor would of itself warrant us to grant the information; but that is a minor offence, when compared with that of publishing the papers in question during the pendency of the cause at the assizes, and in the hour of trial. It is the pride of the constitution of this country that all causes should be decided by jurors, who are chosen in a manner which excludes all possibility of bias, and who are chosen by ballot, in order to prevent any possibility of their being tampered with. But, if an individual can break down any of those safeguards which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And, therefore, I cannot forbear saying, that, if the publication be brought home to the defendant, he has been guilty of a crime of the greatest enormity." Again, in the case of *Rex* v. *Fisher* (4), the printer, publisher, and editor were convicted for publishing a scandalous, defamatory, and malicious libel, intending to injure one Richard Stephenson, charged with assault, and deprive him of the benefit of an impartial trial, "and to injure and prejudice him in the minds of the liege subjects of our lord the King and to cause it to be believed that he was guilty of the said assault and thereby to prevent the due administration of justice and to deprive the said

(1) 2 Atk. 471.
(2) 4 T. R. 285.
(3) 4 T. R. at p. 289.
(4) 2 Camp. 563.

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Richard Stephenson of the benefit of an impartial trial." It was urged on behalf of the defendants that this was an indictment for libel, and that, therefore, it was no authority for the indictment in the present case. But, if the judgment of Lord Ellenborough is examined, it will be noted that the main ground of the judgment is that the publication would tend to pervert the public mind and disturb the course of justice and therefore be illegal, and we cannot doubt that, if the attempt so to do be made, or means taken, the natural effect of which would be to create a wide-spread prejudice against persons about to take their trial, an offence has been committed, whatever the means adopted, provided there be not some legal justification for the course pursued. The case of *Rex* v. *Williams* (1) is another distinct authority for the same view, in which it was laid down that any attempt whatever to publicly prejudge a criminal case, whether by a detail of the evidence or by a comment, or by a theatrical exhibition, is an offence against public justice and a serious misdemeanour. The publication of proceedings publicly held in a Court of Justice, if fair and accurate, has now the protection of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 3. The law as laid down in the older cases to which we have referred was summarised by Blackburn J. in *Skipworth's Case* (2), and with reference to the objection that the more proper proceeding should be by proceedings for contempt of Court, we would refer to the judgment of the Court in *Reg.* v. *Gray* (3), from which it clearly appears that in many cases it is preferable to proceed by information or indictment rather than by motion for contempt. We have no doubt whatever that the publication of the articles in this case, at the time when, and under the circumstances in which, they were published, constitutes a criminal offence by whomsoever they were published. We think that the facts, which bring the incriminated articles within the category of misdemeanour, abundantly appear upon the face of each count, and that, under those circumstances, it is perfectly immaterial whether the articles

(1) 2 L. J. (K.B.) (O.S.) 30. (2) L. R. 9 Q. B. 230, at p. 232.
(3) [1900] 2 Q. B. 36.

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be described and charged as libels or contempts or not. With reference to the argument, which was strongly urged, that there was no evidence of any intention to pervert the course of justice, we are clearly of opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases in which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases. We further think that, if the articles are in the opinion of the jury calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: see *Reg.* v. *Grant.* (1) We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted can have no weight in the decision of the question now before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting, either wholly or in part, from the influence upon the minds of the jurors at the trial of such articles as these, justifies their publication. This is an argument which we need scarcely say reduces the position almost to an absurdity, and, indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. A person accused of crime in this country can properly be convicted in a Court of Justice only upon evidence which is legally admissible and which is adduced at

(1) 7 St. Tr. (N.S.) 507.

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his trial in legal form and shape. Though the accused be really guilty of the offence charged against him; the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence.

We have now only to consider the special points which were taken on behalf of the defendant Windust as regards the first six counts, and as regards both the defendants in regard to the conspiracy counts. We agree that in such a case some evidence must be given that the defendants were really parties to the publication complained of: see *Reg.* v. *Holbrook*. (1) Mr. Foote attempted to restrict conspiracy to matters germane, at least to those referred to in the Ordinacio de Conspiratoribus, 33 Edw. 1. It is obvious, however, that the statute does not give an exhaustive definition, and other matters beyond those enumerated in that statute have been adjudged over and over again to be the subjects of criminal conspiracies. As to the expressions of Willes J. in *Mulcahy* v. *Reg.* (2), upon which Mr. Foote insisted, it is plain that that very learned judge was there speaking of a case in which the criminal intention had not been carried into effect, and he says that in such a case the very promise to do it—such a promise as would be binding if for a lawful purpose—is an act which negatives the suggestion that the matter rests in intention only. He never said that when the unlawful purpose has been carried out no indictment for conspiracy can be maintained unless the concerted action has been preceded by such a contract between the conspirators as, if the purpose had been lawful, would have given ground for a lawsuit. His definition is not of conspiracy, but of the kind of conduct which is sufficient to make the concerted action pass from the stage of intention into that of action.

The evidence against Windust submitted to the jury, as appears from the case stated, was as follows: That in 1897

(1) (1877) 3 Q. B. D. 60; (1878) 4 Q. B. D. 42. (2) L. R. 3 H. L. 306.

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he was the "Crime Investigator" of the *Weekly Dispatch* and was engaged in June of that year in investigating a case then pending at the South London Sessions. That on several of the occasions when Allport and Chappell were before the magistrates Windust was present in court taking notes of the proceedings. He was seen on May 2, 1901, at the office of the *Weekly Dispatch*, and the articles in question purported to be written by the "Special Crime Investigator" of the paper. Under these circumstances we are of opinion that there was evidence to leave to the jury that Windust was party to, and concerned in, the publication of the articles, and was an accessory before the fact. As regards Tibbits, it was proved that he was the editor of the *Weekly Dispatch* at the time of the publications. He afterwards placed himself as such editor in communication with the Director of Public Prosecutions respecting the enquiries which were being made at Bristol as to the publication of papers. The articles formed an important part of the issues of the paper in question, and we think that in his case there was clearly evidence to be submitted to the jury. As regards the conspiracy counts, on which the defendants were also found guilty; inasmuch as they were also convicted on the other counts the point is not very important; but we think it right to say that there was, in our opinion, evidence for the jury as to the conspiracy counts. Such articles would not be published without the concurrence of some one at Bristol, and the person in fact editing the paper, and we are of opinion that there was evidence to go to the jury on which they might properly draw the conclusion that the defendants combined for the purpose of publishing the articles in question. For the above reasons we think the conviction should be affirmed as against both defendants.

Conviction affirmed. (1)

Solicitors for prisoner: *Mellor, Smith & May.*

Solicitor for prosecution: *The Solicitor to the Treasury.*

(1) At the next assizes at Bristol each of the prisoners was sentenced to six weeks' imprisonment in the second division on each count of the indictment, but the sentences were directed to run concurrently on each count.

A. P. P. K.

PEARKS, GUNSTON & TEE, LIMITED, APPELLANTS *v.* RICHARDSON, RESPONDENT. 1901 *Nov.* 19.

Practice—Sale of Food and Drugs Acts—Service of Summons on Limited Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 62.

A summons to appear to an information under the Food and Drugs Acts can only be served on a limited company in the manner prescribed by s. 62 of the Companies Act, 1862, by being left at or sent to the registered office of the company.

CASE stated by justices.

The appellants are a limited joint stock company, incorporated under the Companies Acts, 1862 to 1898, and carrying on business as grocers and provision dealers, amongst many other places, at 13, High Street, Canterbury. The registered office of the company is at 6, Bayer Street, Golden Lane, in the City of London.

The respondent is an inspector under the Sale of Food and Drugs Acts in the city of Canterbury.

On June 1, 1901, the respondent went to the appellants' shop at 13, High Street, Canterbury, and purchased a pound of butter.

He subsequently preferred an information against the appellants under s. 3 of the Sale of Food and Drugs Act, 1875, charging them with selling butter which to their knowledge was mixed with a certain ingredient (to wit, boracic acid) injurious to health.

The summons calling upon the appellants to appear to answer the information was served by a police sergeant who handed it to the appellants' assistant in their shop at 13, High Street, Canterbury. The appellants were properly described in the summons.

The appellants appeared, under protest, by their solicitor, and before the hearing of the information objected to the mode of service of the summons, and contended that it should have been served in accordance with s. 62 of the Companies Act,

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1862, at the registered office of the appellants in London, and that the service at the shop in Canterbury was not a legal and proper service, and that the justices had, therefore, no jurisdiction to hear the information. The justices overruled the objection, and held that the summons had been legally and properly served; and thereupon the appellants' solicitor took no further part in the proceedings.

The appellants having been convicted, this case was stated on the question whether the summons was legally and properly served upon the appellants.

Macmorran, K.C. (*Bonsey* and *Ricardo* with him), for the appellants. The summons was not properly served. The only method of serving a company is provided by s. 62 of the Companies Act, 1862. (1) Sect. 19 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), provides regulations as to what the summons under the Acts shall contain, but does not affect the service of the summons, which is regulated by the Summary Jurisdiction Acts. Sect. 1 of the Summary Jurisdiction Act, 1848, which provides for the manner in which a summons is to be served, is clearly inapplicable to service on a company. [He referred to Rules of the Supreme Court, Order IX., r. 8; *Newby* v. *Von Oppen* (2); *Wood* v. *Anderston Foundry Co.* (3)] The appearance of the appellants under protest and to raise the point did not waive the invalidity in the service of the summons.

The respondent did not appear.

LORD ALVERSTONE C.J. In this case it seems to me that, in the absence of any legislation or of any rule of practice lawfully made by a competent authority, the service of such a summons upon a company should be in the manner prescribed by s. 62 of the Companies Act of 1862. It is, I think, not without importance to observe that in the Friendly Societies

(1) By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62, "Any summons, notice, order, or other document required to be served upon the company may be served by leaving the same or sending it through the post in a prepaid letter addressed to the company at their registered office."

(2) (1872) L. R. 7 Q. B. 293.

(3) (1888) 36 W. R. 918.

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Act, 1896 (59 & 60 Vict. c. 25), special provision is made by s. 94, sub-s. 4, for serving a summons or other proceeding.

There is no doubt that writs and other proceedings, both in the High Court and in the county court, must be served on a limited company in the manner required by s. 62 of the Act of 1862, and there seems to be no reason why a difference should be made in regard to criminal proceedings. Certainly, in criminal matters the practice should not be more lax than in civil proceedings. In my opinion, therefore, this summons was not properly served. But then it may be contended that, as the defendants appeared by a solicitor to raise the objection as to service, the magistrates had jurisdiction to deal with the matter, even although there was no proper service of the summons. It is clear, however, that the defendants' solicitor merely attended to take the point that the summons was invalid for want of proper service, and that when that objection was overruled he at once withdrew from the case. I feel no doubt that where the appearance by the solicitor was solely to raise a point of substance as to the invalidity of the proceedings, and he took no further part in the case, that is not such an appearance as will give the magistrates jurisdiction to proceed, and does not operate in any way as a waiver of the objection to the service. In my opinion, therefore, the magistrates had no jurisdiction to entertain the question, and this conviction must be set aside.

DARLING and CHANNELL JJ. concurred.

Conviction quashed.

Solicitors for appellants: *Neve, Beck & Kirby.*

A. P. P. K.

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M'DONALD, APPELLANT *v.* HUGHES, RESPONDENT.

Licensing Acts—Licence—Public-house—Licensed Person—Executor of deceased Licensee—Licensing Act, 1872 (35 *&* 36 *Vict. c.* 94), *ss.* 3, 17.

The executor of a deceased licensed person who continues to carry on the business under the provisions of s. 3 of the Licensing Act, 1872, until the next special sessions is himself a licensed person within the meaning of the Act.

CASE stated by justices.

Margaret Hughes, who died on April 1, 1901, was, prior to and at the date of her death, duly licensed to sell by retail intoxicating liquors in the house and premises known as the Green Lodge Hotel, Hoylake, in the county of Chester. By her will she appointed the respondent, Margaret Christina Hughes, to be her executrix, and the will was duly proved by the respondent on May 21, 1901. Special sessions for the transfer of licences in the division were held on April 11, 1901, but, this date being within fourteen days of the death of Margaret Hughes, no application for a transfer of the licence was then made, and, as the next day appointed for holding special sessions for the division was June 6, 1901, the respondent, as executrix, remained in possession and occupation of the hotel, and was carrying on the business there and managing the hotel on May 27, 1901. Upon that day several police officers visited the premises and found there several persons who, as they alleged, were unlawfully gaming there; and an information was accordingly preferred by the appellant, who was the superintendent of police, against the respondent, charging her with an offence under s. 17 of the Licensing Act, 1872. At the hearing of the information it was contended that the respondent was not a licensed person within the meaning of the section, since no licence for the sale of intoxicating liquors had ever been granted to her by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828. The justices

upheld the objection and dismissed the information, but stated this case for the opinion of the Court. (1)

R. M. Montgomery (*Honoratus Lloyd* with him), for the appellant. The respondent, as executrix of the deceased licensee, held the licence under the proviso to s. 3 of the Act of 1872, and was therefore a licensed person within the definition given by s. 74. The licence did not cease to exist on the death of the licensee, but was kept alive for the benefit of the representatives of the deceased till the next special sessions. If the view taken by the magistrates is correct, all the offences enumerated in s. 13 to s. 18 of the Act of 1872 might be committed with impunity by a person holding a licence under the proviso to s. 3.

[He was stopped.]

Tobin, for the respondent. The magistrates were right. A licence is a personal grant, and at the date of this occurrence the respondent was not a person holding a licence, and was not therefore a licensed person within the meaning of the Act. The proviso to s. 3 says nothing about the licence being continued or transferred to the personal representatives of the deceased person. It only provides that until the next special

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same . . . . No penalty shall be incurred under this section by the heirs, executors, administrators, or assigns of any licensed person who dies before the expiration of his licence . . . . in respect of the sale or exposure for sale of any intoxicating liquor, so that such sale or exposure for sale be made on the premises specified in such licence and take place prior to the special session then next ensuing, or (if such special session be holden within fourteen days next after the death of the said person . . . .) take place prior to the special session holden next after such special session as last aforesaid."

By s. 17, "If any licensed person suffers any gaming or any unlawful game to be carried on on his premises . . . . he shall be liable to a penalty . . . ."

By s. 74, "In this Act . . . . 'licence' means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828 . . . .

"'Licensed person' means a person holding a licence as defined by this Act."

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sessions the representative shall not be liable to any penalty for carrying on the business of the house. If he desires that the licence shall be granted to him, he has to go to the special sessions and apply for it under s. 14 of the Act of 1828 (9 Geo. 4, c. 61). He has no licence until then, but is merely protected from penalties.

If the respondent was the holder of a licence at the date of the occurrence she could only be holding the licence of her testatrix, which would run to October 10, and if that licence was not determined by the death of the licensee there would be no need for the protection given to the executrix by the proviso to s. 3, or for her to go to special sessions for a licence under s. 14 of the Act of 1828.

No doubt it is a casus omissus in the Act; but the consequences are not so far-reaching as is suggested, since the respondent, if not a licensed person, could be prosecuted under other Acts, such as the Gaming Act.

LORD ALVERSTONE C.J. In this case we have to construe some words of the Licensing Act, 1872, which apparently have not hitherto received consideration. The question that we have to decide is whether an executrix in occupation of a licensed house, and carrying on the business of the house and selling liquors upon the premises, may be made subject to penalties for allowing card-playing to take place on those premises as a licensed person, meaning thereby a person holding a licence as defined by the Act. By s. 74 of the Act of 1872, "licence" means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Act of 1828, and a licensed person means a person holding such a licence. That interpretation clause must have been inserted with some intention, and it seems to me that if the view suggested by Mr. Tobin is correct there would not be any case in which that clause was needed.

In my opinion, after the death of a person holding such a licence, the licence continues to exist for a certain time, provided that the representatives of the licensed person come to the next special sessions (held more than fourteen days after

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the death of the licensed person) for a licence; and the effect of the interpretation clause is to say that the representative of the deceased person is entitled to act as if he or she were a licensed person during that period—that is to say, as if he or she were holding the licence. The argument that if we were to take the contrary view a large number of offences which are provided for in ss. 13 to 18 of the Licensing Act, 1872, might be committed with impunity by the representatives of a deceased licensee seems to us to have great weight.

In my opinion, a person holding the licence till the next special sessions after the death of the licensee is a licensed person within the meaning of the Act; and the case must, therefore, go back to the magistrates.

DARLING J. I am of the same opinion. It seems to me that the strongest argument against the respondent is that on which the justices most relied in finding in her favour, namely, the proviso to s. 3 of the Act of 1872. The executor of a deceased licensee is not treated in that proviso as being an unlicensed person. He is a person holding the licence, although he is not the grantee of it. It is important to notice also that under s. 14 of the Act of 1828 the executor may obtain from the special sessions a licence which is valid till the next licensing sessions—that is to say, for the whole of the rest of the period covered by the old licence.

I do not think that this is a casus omissus at all, but it seems to me that it is clearly provided for by the Act.

CHANNELL J. I agree that this appeal must be allowed; but I do not think the words of s. 3 are very apt. It does not say that the operation of the licence is to be extended for a limited period, but that is, I think, what the words of the proviso mean. The licence is no doubt a personal licence, but by this proviso it is, I think, to continue until the executor has had an opportunity of applying to special sessions for a licence. In the meantime he is a person holding the premises under the operation of the licence, and therefore a person

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holding a licence, and, consequently, a licensed person within the meaning of the Act.

Case remitted.

Solicitors for appellant: *Philpot & Morrell, for R. Potts, Chester.*

Solicitors for respondent: *J. E. & H. Scott, for Thompson, Hughes & Mathison, Birkenhead.*

A. P. P. K.

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Nov. 15.

[IN THE COURT OF APPEAL.]

In re X. Y.

Ex parte HAES.

Bankruptcy—Bankruptcy Petition—Evidence—Admissibility—Evidence of Debtor—Debtor's Books.

On the hearing of a bankruptcy petition the petitioning creditor is entitled to production of the debtor's books for the purpose of proving the allegations in the petition.

The Court of Appeal also expressed their opinion that on the hearing of a bankruptcy petition the petitioning creditor is entitled to call the debtor himself as a witness in support of the petition, on the ground that, now that a debtor can petition for an adjudication of bankruptcy against himself, bankruptcy proceedings can no longer be considered as of a quasi-criminal nature.

APPEAL against the dismissal by one of the registrars of a bankruptcy petition.

The acts of bankruptcy alleged were, that the debtor had made fraudulent conveyances, gifts, deliveries or transfers of specified parts of his property, and that he had made conveyances or transfers of specified sums of money which would be void as fraudulent preferences in the event of his being adjudged bankrupt on the petition. In order to prove the alleged acts of bankruptcy the petitioning creditors relied (inter alia) upon entries in the debtor's books. The registrar held that the debtor's books could not be used as evidence in support of a bankruptcy petition against him, and the registrar dismissed

the petition on the ground that the alleged acts of bankruptcy had not been proved.

The petitioning creditors appealed.

Herbert Reed, K.C., and *Carrington*, for the creditors. In refusing to allow the petitioners to make use of entries in the debtor's books as evidence against him, the registrar said that it was contrary to the practice in bankruptcy to allow a petitioning creditor to call the debtor himself to prove the allegations of a bankruptcy petition against him. The appellants, however, do not want to call the debtor; they only desire to make use of his books to prove their case. It is submitted that entries in his books can be used as admissions by him. The rule in bankruptcy that the debtor could not be called by the petitioning creditor was founded on the old doctrine that an interested person was not a competent witness. There are, however, some cases in which the Court of Bankruptcy has allowed the debtor to be called. Of course he could not be compelled to criminate himself. But that is not a reason why he should not be called.

In *In re Holloway* (1), upon an application by a bankrupt to set aside an adjudication against him, Mr. Commissioner Goulburn himself examined the bankrupt as to the state of his affairs. And in *In re Dufaur* (2), upon an appeal against an adjudication the bankrupt was examined, and upon his evidence the Lords Justices annulled the adjudication. In Starkie on Evidence, 3rd ed. vol. ii. p. 190, it is said to be "an inveterate and universal rule that the bankrupt himself is not a competent witness to prove any fact to support or impeach the Commission . . . . even though he shall have obtained his certificate, and have released the assignees, for he is interested in the certificate which is founded upon the bankruptcy."

In *Williams* v. *Williams* (3), "in an action brought by the assignees of a bankrupt for money had and received to their use," it was held that "the wife of the bankrupt, who has not

(1) (1854) 1 Bank. & Ins. Rep. 244, 247.

(2) (1852) 21 L. J. (Bank.) 38.

(3) (1840) 6 M. & W. 170.

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obtained his certificate, but has released his assignees, is not a competent witness to prove the payment of a sum of money to the defendant by the bankrupt after his bankruptcy."

But in *Udal* v. *Walton* (1) it was held that "a bankrupt is a competent witness, in an action by his assignees against parties claiming under an execution, to prove notice to them of a prior act of bankruptcy. *Semble*, also he is competent, since 6 & 7 Vict. c. 85, to prove the petitioning creditor's debt, or act of bankruptcy, or any fact which tends to support the Commission."

In *Ex parte Castrique* (2) Mr. Commissioner Goulburn held that, notwithstanding s. 100 of the Bankrupt Law Consolidation Act, 1849, he had "no power to make a party give evidence against himself in support of an adverse petition for adjudication against him."

The books relating to the debtor's business ought at any rate to be produced, though of course objection may be taken to the admissibility of any of the entries.

Muir Mackenzie, for the debtor. The points taken do not really arise, for, if the acts of bankruptcy alleged are proved, they will not, by reason of their dates, be available in support of this petition.

The debtor's books could not be evidence of a fraudulent intent on his part, or to shew that he made a payment to a creditor with intent to prefer him.

The Court has a discretion with regard to the making of a receiving order. A petitioning creditor must personally attend the hearing of his petition, and none the less so that his debt is a judgment debt, because the Court may go behind the judgment. If the petitioner fails to do this, or refuses to submit to cross-examination on the demand of the debtor, the receiving order will be set aside as irregular: *In re Purritt.* (3) And by s. 105, sub-s. 5, of the Bankruptcy Act, 1883, the Court has a discretion as to the mode of taking evidence. A petitioner ought to come to the Court with evidence of his own, and ought not to seek to prove his case out of the debtor's own

(1) (1845) 14 M. & W. 254. (2) (1864) 10 L. T. (N.S.) 757.
(3) (1895) 2 Mans. 403.

mouth. The old practice of the Court of Bankruptcy is clear —that a debtor cannot be called in support of a bankruptcy petition against him; and the same principle applies to the debtor's books. And by rule 353 of the Bankruptcy Rules, 1886, "When no other provision is made by the Act or these rules the present law, procedure, and practice in bankruptcy matters shall, in so far as applicable, remain in force." Moreover, proceedings in bankruptcy are of a quasi-penal nature: *In re Howes*. (1) In that case Bowen L.J. said (2): "Bankruptcy proceedings are of a peculiar character. They involve quasi-penal consequences to the debtor." This is one reason why the rules as to evidence in bankruptcy proceedings are exceptional.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must succeed, and the petition must go back to the registrar. No one who is familiar with the bankruptcy practice can fail to know that for a very long time it has been the practice in bankruptcy to refuse to allow a petitioning creditor to call the debtor in support of a petition adverse to him. I need not perhaps go into that question to-day, for I understand that it is not relied upon as a ground of appeal against the order of the registrar that he refused to allow the debtor to be called. Still, I think it is better that I should say a word or two about that practice. Of course the mere fact that it has been the practice of the Bankruptcy Court is not sufficient to make it right that we should exclude the evidence of a debtor when the petitioning creditor desires to call him in support of the petition, unless we can recognise the principle of the exclusion. Mr. Herbert Reed has suggested that the principle of the exclusion was the old common law rule which excluded the evidence of interested witnesses. In my view this practice in bankruptcy had nothing to do with that rule. Mr. Reed has cited some common law cases—actions of assumpsit and an interpleader action—in which the assignees of a bankrupt were either plaintiffs or defendants, but the result of the action might have been to increase or diminish the estate of the bankrupt, and there the

(1) [1892] 2 Q. B. 628. (2) [1892] 2 Q. B. at p. 632.

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evidence of the bankrupt was excluded on the ground of interest, because theoretically he had an interest in the possible surplus. But it is plain that no such ground could apply to a bankruptcy petition when the question was whether the debtor could be called in support of the petition. I feel no doubt that the reason of the rule was that proceedings in bankruptcy were regarded as in some sense criminal proceedings, and the reason why the debtor was not allowed to be called was an extension of the common law rule that you could not call a prisoner to prove the case against himself. That was not always a principle of English law. It was evolved by common law judges, who in the course of time came to the conclusion that it would not further the ends of justice to call a criminal to prove the case against himself. And I may observe that this principle is recognised at the present moment by the statute law, for although a recent statute enables an accused person to give evidence, it still refuses to allow the prosecution to compel a prisoner to go into the witness-box if he is unwilling to do so. In former days bankruptcy proceedings were undoubtedly regarded as being in some sense criminal proceedings; this description of bankruptcy proceedings is to be found again and again, not only in cases in the Bankruptcy Court, but in cases in the Common Law Courts, and I think also in the Court of Chancery. The question was discussed in *In re Holloway*. (1) There the counsel who appeared for the petitioning creditor was asked by the Commissioner, "Why has not the bankrupt been examined?" It is obvious that that did not mean, Why did not you call him when you wished to prove the requisites for a bankruptcy? The meaning was, Why did not you examine him under s. 100 of the Bankrupt Law Consolidation Act, 1849, which gives power to the Court before adjudication to summon before it any person whom it should think capable of giving any information concerning the trading of or any act of bankruptcy committed by the debtor? In *In re Holloway* (1) there had already been an adjudication, and the bankrupt wished to have it set aside. The counsel for the petitioning creditor said: "It has never been the practice to examine a

(1) 1 Bank. & Ins. Rep. 244.

bankrupt to prove his own act of bankruptcy, and it has been doubted whether it can be legally done, as bankruptcy is in some sense a criminal proceeding." In those days, when a certificate of bankruptcy was not conclusive evidence in all courts, whether you were proceeding in a criminal court or a civil court, you had to prove the act of bankruptcy and the debt over again. And the learned counsel said that it was not the practice to examine the bankrupt in order to prove those matters against him. Again, in *In re Dufaur* (1) there was an appeal against an adjudication, and the Lords Justices examined the alleged bankrupt, and upon his evidence they annulled the adjudication. In that case the appeal was by the bankrupt, and he was examined on his own application; so it really comes to nothing. He was a solicitor, and as such he could not at that time be made a bankrupt. He was made a bankrupt as a scrivener, and Knight Bruce L.J. in his judgment said (2): "The only possible objection to the adjudication the Commissioner has made, and which upon the only evidence before him he was bound to make, is, that Mr. Dufaur is not, and has not been, a scrivener within the meaning of the bankruptcy laws. Considering that the petitioner did not offer himself before the Commissioner for examination—considering how he has conducted himself—considering that he is probably or certainly insolvent, I was at one time disposed to refuse to interfere to assist him against the adjudication, and to require that an action should be brought." Under those circumstances the examination of the bankrupt was allowed, and his examination proved that he had not been a scrivener. The only other case which, so far as I know, bears on the question is *Ex parte Castrique*. (3) There the decision related to an examination under s. 100 of the Bankrupt Law Consolidation Act, 1849. An application was made under that section to examine the debtor in order to prove an act of bankruptcy by him. Mr. Roxburgh appeared for the debtor, and objected "that the Court had no power to examine a debtor for the purpose of supporting his creditor's petition against him. The only

(1) 21 L. J. (Bank.) 38. (2) 21 L. J. (Bank.) at p. 42.
(3) 10 L. T. (N.S.) 757.

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power which the Court had before adjudication was under s. 100 of the Bankrupt Law Consolidation Act, 1849. This enactment applied to persons other than the party himself against whom the petition was presented. He asked that the summons might be dismissed with costs." Mr. Commissioner Goulburn said: "I have no power to make a party give evidence against himself in support of an adverse petition for adjudiction against him." There is no doubt about the authority of that case, and it has been acted upon ever since.

It is suggested that there is now no ground for supporting this practice. Speaking for myself, I must say very reluctantly, because I consider the practice was a very wholesome one, I cannot find any principle which now justifies it, whether as regards the examination of the debtor himself, or the production of his books. In saying this I am bearing in mind, amongst other things, that since 1869 the nature of bankruptcy proceedings has been considerably altered. It is difficult to say that bankruptcy proceedings are in any sense criminal now that a debtor may petition against himself. Under these circumstances I suppose that this practice will have to be altered.

I should add that if the books are produced, and they are proved to be the books of the debtor, it is plain that primâ facie they are evidence against the debtor as admissions by him. I think, therefore, that an order ought to be made for their production.

Mr. Mackenzie has endeavoured to shew that the non-admission of these books was immaterial, because it could not have affected any of the matters upon which the learned registrar dismissed the petition. But it seems to me obvious that the production of the books might have affected the matter very materially, and particularly so when the counsel for the debtor relied upon his books in the first instance, and afterwards strongly pressed his objection against the production of the debtor's ledgers.

Under these circumstances I think the petition must go back to the learned registrar for further consideration.

ROMER L.J. I agree. It appears to me impossible at the present time to say that the presentation of a bankruptcy petition against a man is in the nature of a criminal proceeding against him, so as absolutely to prevent the petitioning creditor from calling the debtor himself, if he thinks fit to do so, to prove the petitioning creditor's case. No doubt it has been, as I gather, the habit of the Bankruptcy Court not to allow the debtor to be called as a witness on such an occasion or for such a purpose. But, of course, whatever may have been the habit of the Court in this respect, if at the present time a petitioning creditor is legally entitled to call the debtor, the mere habit of the Court cannot make a "practice" within the meaning of rule 353 of the Bankruptcy Rules, so as to prevent a person who has a legal right in all courts to call a particular witness to prove a particular fact from exercising that legal right. And in the present case, if the petitioning creditor has a legal right to call the debtor as his witness in support of the petition, it appears to me that no habit of the Court can prevent the petitioning creditor from insisting upon that witness being called and giving evidence. Whatever the "practice" of the Court, as it has been called, in this respect, may have been; whatever its origin was; whether at one time it was right not to allow the debtor to be called, I need not say. I think it is very possible, as my Lord has said, that at one time proceedings in bankruptcy were in the nature of criminal proceedings. But, however that may be, I think that at the present time it is impossible to say that a petition for an adjudication of bankruptcy is in the nature of a criminal proceeding. Of course if the debtor is called he will still have the right, if any question should be put to him which may affect him criminally, to claim the usual privilege, and to decline to answer. But, as regards all other matters, I do not see why, if he should be called upon to give evidence to prove the case against himself, he should not do so. I do not suppose that this alteration of the so-called practice of the Bankruptcy Court will do much or indeed any mischief, and for this reason, that there can be but very few cases in which a petitioning creditor would choose to run the risk of calling the debtor to give evidence in support

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of the petition against him. I certainly do not think that the not following what has been called the practice of the Bankruptcy Court in the present instance is likely to cause any mischief. On principle I cannot see why, if a petitioning creditor sees that he can establish the commission of an act of bankruptcy in the shortest possible way by calling the debtor himself, he should not be at liberty to do so, instead of being compelled to establish that fact by calling a number of witnesses who could not possibly prove the case as well as the debtor himself could.

With regard to the production of the debtor's books I have nothing to add. Even if the proceeding here had been in its nature criminal, the books would have been evidence against the debtor for what they are worth, and they ought not to have been excluded. It appears to me impossible to say that, if those books had been admitted, they might not have affected the order made on the petition. I agree that the petition must go back to the registrar.

COZENS-HARDY L.J. I also agree, and I have very little to add. I have looked in vain and I have asked in vain for anything in the Bankruptcy statutes or in the Rules which excludes from the consideration of the Court that which the law recognises in other cases as admissible evidence. And although, as my learned brother has said, there may be very few cases in which it may be expedient as a matter of policy to call the debtor himself, I can conceive of some cases in which it might very greatly shorten and facilitate the matter. The petitioning creditor's debt might depend on a document alleged to have been signed by the debtor himself. There might be great difficulty in proving the handwriting; and if the petitioning creditor was prepared to call the debtor, and ask him, "Is this your signature?" I can see no principle of law which would disentitle him from so doing.

Appeal allowed.

Solicitors: *M. Abrahams, Sons & Co.; Osborn & Osborn.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 15.

In re DUNN.
Ex parte SENIOR OFFICIAL RECEIVER.

Bankruptcy—Offences by Bankrupt under Bankruptcy Act—Prosecution—Report of Official Receiver—Consideration by Court—Filing of Report—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 16—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 31, 163, 164, 166.

When the official receiver in bankruptcy has reported to the Court that a bankrupt has committed offences under the Bankruptcy Act, it is the duty of the Court to consider the report, and, even if the official receiver does not ask for an order directing the prosecution of the bankrupt, to determine whether he ought to be prosecuted.

The Court, however, is not bound to determine the question at once, but it may adjourn the determination to a future time.

The Court ought not, simply because the official receiver does not ask for an order to prosecute the bankrupt, to decline to consider the report at all.

When the official receiver has made his report it ought to be filed.

APPEAL ex parte by the senior official receiver against the refusal of one of the registrars in bankruptcy of the appellant's application that the Court would consider his report made in the bankruptcy of A. J. Dunn, and would make such order as to a prosecution of the bankrupt or otherwise as to the Court might seem fit.

In his report the official receiver stated that in his opinion the bankrupt had been guilty of offences (which were specified) under s. 31 of the Bankruptcy Act, 1883. But the official receiver did not state whether in his opinion there was a reasonable probability of the bankrupt being convicted, if he were prosecuted for the offences, nor did he ask the Court to direct a prosecution. At the hearing of the application the official receiver stated that he made no application for an order to prosecute the bankrupt for the offences which in his opinion the bankrupt had committed. The registrar made the following order: "This Court doth decline to take into consideration the report of the official receiver with a view to making any order for the prosecution of the bankrupt or otherwise, there

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not being a specific application before the Court for an order to prosecute, but without prejudice to any application to be made by the official receiver, if so advised, for an order for the prosecution of the bankrupt."

Sir R. B. Finlay, *A.-G.*, *H. Sutton*, and *Muir Mackenzie*, for the appellant. It has, no doubt, been the practice of the registrars in bankruptcy to make orders in this form, when the official receiver has reported that a bankrupt has been guilty of offences under the Bankruptcy Act, 1883, or the Debtors Act, 1869, but has not applied to the Court to direct a prosecution. It is submitted that this practice is wrong. It may not be always expedient to direct a prosecution, but it is submitted that, under s. 16 (1) of the Debtors Act, it is the duty of the

(1) By s. 16 of the Debtors Act, 1869, "Where a trustee in any bankruptcy reports to any Court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the Court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the Court shall, if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence."

By the Bankruptcy Act, 1883, s. 31, "Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanor, and may be dealt with and punished as if he had been guilty of a misdemeanor under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section."

By s. 163, "(1.) Sects. 11 and 12 of the Debtors Act, 1869, relating to the punishment of fraudulent debtors and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words 'if after the presentation of a bankruptcy petition against him,' the words, 'if after the presentation of a bankruptcy petition by or against him.'

"(2.) The provisions of the Debtors Act, 1869, as to offences by bankrupts shall apply to any person, whether a trader or not, in respect of whose estate a receiving order has been made as if the term 'bankrupt' in that Act included a person in respect of whose estate a receiving order had been made."

By s. 164, "Sect. 16 of the Debtors Act, 1869, shall be construed and have effect as if the term 'a trustee in any bankruptcy' included the official receiver of a bankrupt's estate, and shall apply to offences under this Act as well as to offences under the Debtors Act, 1869."

By s. 165, "(1.) Where there is, in the opinion of the Court, ground to believe that the bankrupt or any

Court, when the official receiver has made such a report, and, whether he does or does not ask the Court to order a prosecution, to determine for itself whether the bankrupt shall or shall not be prosecuted. The Court may of course adjourn the determination of this question, and may wait for further information, but it is submitted that the Court cannot properly decline to consider the report at all. Until the Court has considered the report it cannot, according to the practice, be filed, and, until it is filed, it cannot be inspected by the creditors. The report is not effective until it has been filed, and the official receiver has not discharged his duty until he has called the attention of the Court to his report.

The Court might, if it thought fit, simply order the report to be filed.

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Barnes.* (1)]

The official receiver asks the Court to say that his report ought to be considered, and the necessary steps taken to enable it to be filed. Until it is filed the report is mere waste paper.

VAUGHAN WILLIAMS L.J. I cannot myself say that I quite grasp what is the substantial reason for the application. [The Lord Justice read s. 16 of the Debtors Act, 1869, and continued:—]

There can be no doubt that, if a report is made to the Court by the official receiver that the bankrupt has been guilty of the conduct mentioned in that section, the Court must then

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other person has been guilty of any offence which is by statute made a misdemeanor in cases of bankruptcy, the Court may commit the bankrupt or such other person for trial.

"(2.) For the purpose of committing the bankrupt or such other person for trial the Court shall have all the powers of a stipendiary magistrate as to taking depositions, binding over witnesses to appear, admitting the accused to bail, or otherwise.

"Nothing in this sub-section shall be construed as derogating from the powers or jurisdiction of the High Court."

By s. 166, "Where the Court orders the prosecution of any person for any offence under the Debtors Act, 1869, or Acts amending it, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution."

(1) [1896] A. C. 146.

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consider whether there is a reasonable probability of the bankrupt's being convicted; and if the Court arrives at the conclusion that there is such a probability, it can then order the Director of Public Prosecutions to prosecute the bankrupt for the offences.

Now, that being so, a question has arisen as to the practice. We have been told that when the official receiver makes a report to the Court his report is not filed until the Court has considered it. If that is so, I entirely agree that the report ought to be filed.

Then it is said that the practice has been to do nothing upon the report, unless an application is made by the official receiver or by some one else for an order to prosecute the bankrupt. It is said that that practice is not right or convenient, and that the official receiver has a right to apply to the Court for directions (as he undoubtedly has), and that in a case in which the official receiver has not been able to come to the conclusion that there ought to be a prosecution, it is nevertheless the duty of the Court, upon an application by the official receiver for directions, to consider whether there ought to be a prosecution. But, although it may be the duty of the Court to consider the report, no duty is cast upon it to consider the report at any particular time. The Court may consider the report when it thinks right to do so. The registrar can, if he chooses, say, "I will give no directions at present." I can quite conceive that, as a matter of general practice, it may not be expedient or convenient that the Court should determine whether there ought to be a prosecution of the bankrupt—whether there is or is not a reasonable probability of his conviction—until the facts have been ascertained in such a way as to satisfy at all events the mind of the official receiver himself whether there is such a probability. Although, therefore, it would be manifestly wrong for the registrar to say, "I decline to consider the report at all," yet, in any case in which he thought the facts were imperfect and insufficient, he would clearly be justified in saying, in fact it would be his duty to say, "I refuse to give any directions at present." And if the order under appeal had merely been, "The Court declines to

give any directions," the Court in its discretion would have had a perfect right to do that. But the order does not so run. [The Lord Justice read the order.] That, in my opinion, is not the form in which the order ought to have been made. On the other hand, I am clearly of opinion that the Court, when it has looked at the report, is always entitled to say that it declines to give any direction; and I cannot help thinking that in a great many cases the fact that the official receiver, who clearly has a right to apply for an order for a prosecution, does not do so, may properly be taken into consideration at the moment when the registrar is considering whether he shall or shall not make an order upon the application for directions.

I do not think it is necessary to do anything more at the present moment. This is an ex parte appeal, and the official receiver, acting under the Board of Trade, can go back to the registrar and ask him to give directions, and of course in so doing to consider the report; and when the registrar has considered it, there being no specific application before him for a prosecution, he will, if, on looking at the report as it stands, he thinks he ought not to order a prosecution, be entitled to say, "This Court doth give no direction on the subject."

ROMER L.J. Under s. 16 of the Debtors Act, 1869, in conjunction with s. 164 of the Bankruptcy Act, 1883, it is clear that, when the official receiver has reported to the Court that in his opinion a bankrupt has been guilty of any offence under those Acts, the Court must consider the report and determine whether it will or will not order the bankrupt to be prosecuted for his offence.

The duty of ultimately determining whether a prosecution shall be instituted rests with the Court and not with the official receiver. It appears to me, therefore, that the Court cannot refuse to consider the report merely because the official receiver has not made up his mind whether there ought or ought not to be a prosecution, or will not make a substantive application for an order to prosecute. The report having been made, it must at some time or other be considered

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by the Court, and the Court itself must, under s. 16, make up its mind whether the bankrupt is to be prosecuted. The registrar therefore had, as it seems to me, no power to refuse to consider the report, and so far as the order purports to do that it is, to my mind, clearly wrong. And as a matter of convenience in practice, I think that when the report of the official receiver is sent in it should be filed.

It is also, I think, clear that when the official receiver makes his report, or indeed at any subsequent time, he may apply for the directions of the Court with reference to that report. On the other hand, the Court is not bound, when such an application comes before it, at once to make up its mind whether it will make an order for the prosecution of the bankrupt. The Court may postpone its decision, or may require a further report to be made or further information to be given, or may decline to make any immediate order for a prosecution. The Court is in no way fettered as to the time when or the circumstances under which it will consider the report and make up its mind what it will do, so long as it does at some time or other discharge its duty under the section. Of course, when a report by the official receiver has been made and filed we must assume that the Court will discharge the statutory duty which is cast upon it. After the observations which have fallen from Vaughan Williams L.J., there ought, I think, to be no difficulty in future with regard to proceedings under this section.

COZENS-HARDY L.J. I agree, and I have nothing to add.

Appeal allowed.

Solicitor: *Solicitor to Board of Trade.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A. 1901 Nov. 21.

In re CAMPBELL.

Revenue—Settlement Estate Duty—Property settled by Will—Amount set apart to pay Annuities—Bequest of Residue—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1; *s.* 22—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1.

A testator by his will devised and bequeathed all his real and personal estate to trustees on trust for conversion into money, and out of the moneys so produced to pay his funeral and testamentary expenses, and debts, and certain pecuniary legacies given by the will, and to set aside a sufficient amount of the residuary estate upon trust to pay annuities for life to certain persons, and, subject to that provision, to divide the residuary estate in certain proportions among residuary legatees. The trustees did, in pursuance of the testator's directions, set aside out of the residuary estate a certain amount, which they invested so as to produce an income sufficient to pay the annuities:—

Held, that the fund so set aside was property settled by the testator's will within the meaning of the Finance Act, 1894, s. 5, sub-s. 1, and therefore settlement estate duty was payable upon it.

APPEAL from the judgment of a Divisional Court (Kennedy and Phillimore JJ.) upon a petition for return of moneys paid in respect of settlement estate duty.

By his will dated June 28, 1895, William Campbell, since deceased, appointed his sons, Finlay Campbell and Allan Campbell (the petitioners), to be executors and trustees of his will. He devised and bequeathed to them all his real and leasehold and personal estate on trust for sale and conversion into money of such part thereof as should not consist of money, and out of the moneys produced by such conversion and his ready money to pay his funeral and testamentary expenses and debts, and certain pecuniary legacies bequeathed by the will; and to stand possessed of the residue on the trusts thereinafter declared. Those trusts were as follows: "And I direct my trustees to set aside a sufficient amount of my residuary estate upon trust to pay the following annuities." The will then specified a number of annuities of various

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amounts to be paid to persons named in the will for their respective lives, and then proceeded thus: "And upon further trust to divide the residue of my said estate into one hundred parts, and to pay the same as follows." Then followed a provision for the distribution of the parts into which the residue was to be divided in certain proportions among various persons named. The will contained a provision that the trustees might postpone the sale and conversion of the estate or any part thereof for so long as they should think reasonably fit, and that till conversion the rents and income of such part as should remain unconverted should be applied in the same manner as the moneys produced by the conversion thereof, if converted, would be applicable under the will; and also a clause specifying the securities in which "moneys liable to be invested" under the will might be invested.

The trustees set aside a sum of 134,300*l.* in pursuance of the direction given by the testator, and invested the same so as to produce an annual sum sufficient to cover the amounts of the annuities. The value of the personal estate of which the testator was competent to dispose, was ascertained at 426,699*l.* 11*s.* 8*d.* gross, and estate duty payable under the Finance Act, 1894, in respect thereof, amounting to 36,783*l.* 16*s.* 10*d.*, was duly paid by the petitioners together with interest and succession duty upon such of the above-mentioned annuities as it was by law payable in respect of. The Commissioners of Inland Revenue claimed from the petitioners the sum of 1343*l.* as settlement estate duty upon and in respect of so much of the residuary estate of the testator as had been invested as aforesaid, and from the income of which the said annuities were being paid, in addition to the estate duty and succession duty which had been paid as aforesaid by the petitioners upon and in respect of the whole of the residuary estate and the annuities. The petitioners paid the amount so claimed as settlement estate duty, and claimed by the petition a declaration that the claim of the Commissioners to the same was unfounded and untenable, and a return of the moneys paid in respect thereof.

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The Divisional Court held, on the authority of *Attorney-General* v. *Owen* (1), that settlement estate duty as claimed by the Commissioners was payable, and therefore dismissed the petition.

Asquith, K.C., and *Pollard*, for the appellants. The case of *Attorney-General* v. *Owen* (1) was wrongly decided. The question is whether the property on which duty is claimed was "settled property" within the meaning of the Finance Act, 1894, s. 5, sub-s. 1. By s. 22, sub-s. 1 (*h*), of the Act "settled property" means property comprised in a settlement, and by s. 22, sub-s. 1 (*i*), a "settlement" means any instrument, whether relating to real or personal property, which is a settlement within s. 2 of the Settled Land Act, 1882, or, if it related to real property, would be a settlement within that section. By that section a deed, will, or other instrument, under or by virtue of which land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession, is a settlement for the purposes of the Act. It is submitted that there is no fund here which under the testator's will stands limited to or in trust for persons by way of succession. The case contemplated by the Settled Land Act, 1882, s. 2, is the ordinary case of settlements in which a life estate or some such limited estate is followed by interests in remainder. A gift of an annuity is not a gift of such a life estate. An annuity is only a pecuniary legacy payable by instalments. The case of *Carmichael* v. *Gee* (2) shews that, in a case like the present, the mere fact that, in what Lord Selborne L.C. there called the administration clauses of the will, there is a provision for the setting apart of a particular fund to provide for the annuity is not to be considered as giving the annuitant a life interest in that fund, in respect of which on the death of the annuitant there is a succession to the residuary legatee. It was held in that case that such an annuitant is entitled to resort to the corpus of the residuary estate, and is not restricted to a particular fund set aside under the administration clauses of a will; which shews that the

(1) [1899] 2 Q. B. 253. (2) (1880) 5 App. Cas. 588.

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case is not really one of an interest in the nature of a life interest in a fund followed by interests in remainder. It is clear that the simple gift of an annuity by will without any direction to set aside a portion of the estate to meet it, followed by a gift of the residuary estate, could not be considered as being a settlement of property upon persons by way of succession. The case of *Carmichael* v. *Gee* (1) shews that it does not make any difference that there is a clause directing the trustees of the will, as a matter of administration, to set apart a particular portion of the residue to meet the annuity. The annuity is a charge on the whole estate like any other pecuniary legacy.

The case of *In re Mundy and Roper's Contract* (2) is not really an authority for the present case. There it was held that certain deeds, of which one created a tenancy for life in land, and another exercised a power reserved to the tenant for life by the first deed of creating a jointure and portions in succession to the tenancy for life, were to be read as constituting one settlement, by which the estate stood limited to or in trust for persons by way of succession within the meaning of the Settled Land Act, 1882. That case has no analogy to the present. The question there was whether the tenant for life could under the Act sell the estate discharged from the jointure and portions. It does not follow from that decision that the gift of a life annuity in a will creates a succession in the residuary legatees on the death of the annuitant.

Sir R. B. Finlay, A.-G., and *Vaughan Hawkins*, for the Crown. In the case of *Carmichael* v. *Gee* (1) the only question really was whether the annuitant could have recourse to the corpus of the estate, the income of the fund being insufficient to pay the annuity. There is nothing in the decision of the House of Lords in that case inconsistent with the contention of the Crown in the present case. There is in this case a particular fund created, which the trustees are to hold on trust to pay thereout the annuities. To the extent of his annuity each annuitant has during his life an interest as cestui que

(1) 5 App. Cas. 588. (2) [1899] 1 Ch. 275.

trust in that fund; and, upon the death of each annuitant, to the extent of his interest, the interest of the residuary legatees is increased. It is submitted that this particular fund under the will of the deceased stands limited in trust for persons by way of succession within the meaning of the Settled Land Act, 1882. The case of *In re Mundy and Roper's Contract* (1) is distinctly in point and clearly governs the present case. It is not necessary for the purposes of this case to consider how the matter would stand, if there were merely a gift of an annuity by will in general terms, and no provision for appropriation of any special fund to provide for it. Possibly such an annuity might be regarded merely on the footing of a pecuniary legacy payable by instalments. Here it may be observed that there is no gift of the annuities except that involved in the direction to set aside a particular fund on trust to pay them. Assuming that, if the income of the fund set aside failed to meet the annuities, the annuitants would be entitled to have recourse to the corpus of the residuary estate, that does not do away with the fact that there is a trust in respect of the particular fund in favour of the respective annuitants during their lives, and that upon their deaths the interest of the residuary legatees is increased.

Pollard, in reply.

COLLINS M.R. I am of opinion that this appeal should be dismissed. The question which arises is whether on the terms of the will of a testator, to which I will presently refer, settlement estate duty is payable upon a portion of his estate.

That question turns upon the provisions of s. 5, sub-s. 1, of the Finance Act, 1894, which provides that "where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property, a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate

(1) [1899] 1 Ch. 275.

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hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased." In order to see what meanings are to be given to the words "settled property" and "settlement" under the Act we must look to s. 22, which provides by sub-s. 1 (*h*) that "settled property" shall mean property comprised in a settlement, and by sub-s. 1 (*i*) that "settlement" shall mean any instrument, whether relating to real property or personal property, which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882, or, if it related to real property, would be a settlement within the meaning of that section, and shall include a settlement effected by a parol trust. We must therefore refer back to s. 2 of the Settled Land Act, 1882, sub-s. 1 of which, in substance, provides, leaving out such portions as are immaterial for the purposes of the present case, that any will under or by virtue of which "any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for the purposes of this Act a settlement." We have therefore to see whether the will here in question is, as regards the property upon which the duty is claimed, a settlement within the definition. The will gives to trustees all the testator's property, both real and personal, and directs them to convert the same into money, and, after paying certain legacies out of the proceeds, to set aside a sufficient amount out of the testator's residuary estate upon trust to pay a number of life annuities to certain persons mentioned in the will, and, subject thereto, to divide the residue in certain proportions among the residuary legatees. The counsel for the Crown say that this is a case in which property stands for the time being limited to or in trust for persons by way of succession: that there is an interest in the respective annuitants to which there is a succession in favour of the residuary legatees. The petitioners contend, on the other hand, that this is not a case of settled property, or one in which property is limited to or in trust for persons by way of succession.

The matter does not stand clear of authority. This appeal is really an appeal from the judgment of a Divisional Court in

the case of *Attorney-General* v. *Owen* (1), upon the authority of which the Divisional Court decided the present case. There is also a decision of the Court of Appeal which is binding on us, and which in my opinion concludes this case, namely, *In re Mundy and Roper's Contract.* (2) It will, I think, be sufficient for me to read a passage out of the judgment of Chitty L.J. in that case, which contains all that is material for the present purpose. After reading the 1st sub-section of the 2nd section of the Settled Land Act, 1882, he proceeded to put an interpretation upon it, which was accepted by the other members of the Court, although Vaughan Williams L.J. adduced some reasons which might have led him not to accept it, if he had not conceived himself bound by authority. Chitty L.J. said: "The right interpretation of the words 'stands for the time being limited to or in trust for any persons by way of succession' is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that, according to the natural and ordinary meaning of the words, they include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land, and they succeed to their interests in the land on or after the death of the tenant for life. I state this proposition generally and without reference to the Acts imposing a duty on successions, but such Acts if referred to would support this proposition."

It was argued that the question in this case had really been decided adversely to the Crown by a case in the House of Lords, which was made the main basis of the argument for the appellants, namely, *Carmichael* v. *Gee.* (3) The question in that case was whether a widow who took an annuity under provisions very similar to those of the will here in question must look for payment of the annuity to the income of the particular fund only or was entitled to have recourse to the

(1) [1899] 2 Q. B. 253. (2) [1899] 1 Ch. 275.
(3) 5 App. Cas. 588.

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whole corpus of the estate. It was held that the latter was the case. That was the sole question which the Court had to decide. It was not disputed in the present case that, if the income of the fund set apart were inadequate to pay the annuities, the annuitants would have a right to resort, not only to the corpus of that fund, but also to the residue of the estate. I do not, however, think that it follows from that or from the decision in *Carmichael* v. *Gee* (1) that the contention put forward by the Crown in this case is untenable. In the present case we have a direction by the testator to the trustees of his will to set apart out of the residue of his estate after payment of debts and legacies a sufficient amount upon trust to pay annuities to certain persons during their lives. The effect of that provision is to create a specific fund upon which is impressed a direct trust in favour of the annuitants, who therefore respectively have an interest for life in the fund, which after their deaths passes to the residuary legatees. I think that this is consequently a case in which property by virtue of a will stands limited in trust for persons by way of succession. It was said that, if the trustees subsequently found that the value of the property set apart to meet the annuities became greater than was necessary in proportion to the annuities, the balance might be appropriated to the residue. Assuming that to be so, it does not seem to me to be material. It is none the less the obligation of the trustees to deal with the particular amount set aside so as to give effect to the trusts of the will, which are first to provide for the payment of the annuities to the annuitants during their lives, and then to hand over the fund to the residuary legatees. I think that we should not only be departing from authorities which are directly in point, but also failing to give proper effect to the intention of the testator himself, which appears to me clearly to have been to create a succession in favour of certain persons after an interest given in a particular fund to other persons, unless we held that this was property limited in trust for persons by way of succession.

(1) 5 App. Cas. 588.

STIRLING L.J. I am of the same opinion. The Finance Act, 1894, s. 5, sub-s. 1, provides that, where property in respect of which estate duty is leviable is settled by the will of the deceased, or, having been settled by some other disposition, passes under that disposition on the death of the deceased to some person not competent to dispose of the property, a further estate duty, called settlement estate duty, shall, except in certain cases, be payable. We have therefore to inquire what is the meaning of "property settled" in that sub-section. That is to be gathered from s. 22, sub-s. 1 (*h*) (*i*), of the Act, which provides that "settled property" shall mean "property comprised in a settlement," and that "settlement" shall mean "any instrument whether relating to real property or personal property which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882, or, if it related to real property, would be a settlement within the meaning of that section." By s. 2, sub-s. 1, of the Settled Land Act, 1882, so far as material, it is provided that any deed, will, or other instrument, under or by virtue of which any land, or any estate or interest in land, to which must now for the purposes of the Finance Act, 1894, be added personal property, "stands for the time being limited to or in trust for any persons by way of succession," shall be for the purposes of the Act a settlement. Therefore the inquiry to which we have in the present case to direct our minds must be whether any property does by the will of the testator stand limited to or in trust for any persons by way of succession. The Legislature having introduced into the Finance Act, 1894, the definition given by the Settled Land Act, 1882, regard must be had to the decisions on that Act in construing the Finance Act, 1894. The testator in this case gave all his property to trustees on trust for sale and conversion, and directed the proceeds to be dealt with in the following manner. After payment of certain legacies the trustees were to set aside a sufficient amount of the residuary estate upon trust to pay a number of annuities; there was a further trust to divide the residue in certain proportions among residuary legatees, and there was a provision that the

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trustees might postpone conversion of the estate. The trustees carried out the direction given by the testator, and set aside an amount of the residuary estate, which produces a sufficient income to cover the annuities. Therefore, as it seems to me, we find here property, namely, the portion of the residuary estate so set aside, which, at the present moment, under the trusts of the will, stands limited in trust, first for the payment of the annuities to the annuitants for their respective lives, and, subject thereto, for distribution among the residuary legatees. Under the will the annuitants are cestui que trusts in respect of the fund set apart. The trust with regard to that fund is introduced into the will first for the protection of the annuitants, and secondly for the benefit of the residuary legatees. The annuitants get a fund set apart to secure their annuities, and the residuary legatees benefit by getting an immediate distribution of what is not required to secure the annuities. The primary fund for the payment of the annuities is the income of the fund set apart to provide for them. It was held, no doubt, in *Carmichael* v. *Gee* (1) that in such a case the annuitants would, on that income proving insufficient, have a right of recourse to the whole corpus of the residue; and such right exists in the present case; but that does not seem to me to be inconsistent with the contention of the Crown. I think that we have not got to consider whether the annuitants are tenants for life in the strict sense of the term. The question is whether the property in question comes within the meaning of s. 2 of the Settled Land Act, 1882; and a similar question has been the subject of decision by the Court of Appeal in *In re Mundy and Roper's Contract.* (2) The Court there, though with some doubt on the part of Vaughan Williams L.J., came to the conclusion that the words of the Act included the case of jointures and portions limited to arise on the death of a tenant for life. We cannot disregard that decision in dealing with this case. The question is whether the interests of the annuitants and residuary legatees in the present case arise under limitations by way of succession. I think that in dealing

(1) 5 App. Cas. 588. (2) [1899] 1 Ch. 275.

with that question I cannot do better than adopt the words of Kennedy J. in *Attorney-General* v. *Owen*. (1) He there said, "'By way of succession' seems to me to be a phrase to which one ought, in dealing with this Act, not to assign a narrow or strictly technical meaning, but to treat it as equivalent to 'successively upon death'; and substantially under the present will the property out of which the annuities are paid is property to which, so far as benefit is concerned, the annuitants are entitled during life, and which, so far as benefit is concerned, passes to the residuary devisees upon the deaths of the annuitants"; and then, after referring to what Chitty L.J. said in *In re Mundy and Roper's Contract* (2), he continued: "If succession is not to be treated as a technical or artificial term, if the substance of the thing is to be considered, it appears to me impossible to say here that in truth upon the death of each annuitant in this case the residuary devisees do not succeed to the property which under the terms of the will was first during life to be enjoyed by the annuitant." With those observations I entirely agree. I only wish to add that it was admitted in argument that this decision does not conclude the case of the simple gift of an annuity in general terms, where there is no such trust for payment of the annuity out of a particular fund as in the present case. I desire in giving judgment in this case to leave that case entirely untouched.

MATHEW L.J. I am of the same opinion. The object of the testator in this case was to provide for the payment of certain life annuities and for immediate distribution of the residue, subject to due provision being made for payment of the annuities. For that purpose a special fund was to be created for the protection of the annuitants, and, subject to the trust imposed upon that fund in their favour, the residue of the estate was to be distributed among the residuary legatees. I think that the provisions by which those objects of the testator were brought about amounted to a settlement within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882. If that conclusion be correct, it disposes of the whole case. I

(1) [1899] 2 Q. B. 253. (2) [1899] 1 Ch. 275.

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wish to add that I do not think the decision of the House of Lords in *Carmichael* v. *Gee* (1) is inconsistent with the judgment in this case.

Appeal dismissed.

Solicitors for appellants: *Crosse & Sons.*
Solicitor for the Crown: *Solicitor for Inland Revenue.*

E. L.

C. A. 1901 *Oct.* 25.

[IN THE COURT OF APPEAL.]

WAGSTAFFE AND ANOTHER *v.* BENTLEY AND ANOTHER.

Practice—Costs—Payment into Court with Denial of Liability—Recovery of less than Amount paid in—Costs of Issues found for Plaintiff—Order XXII., *rr.* 1, 6.

In an action to recover damages for injuries arising from the negligence of the defendants, they denied the negligence and paid a sum of money into court with a denial of liability. The plaintiffs did not accept the money paid into court in satisfaction of their claim, and the action went to trial and resulted in a verdict for a less amount. The judge who tried the case ordered judgment to be entered for the defendants with the general costs of the action, and that the plaintiffs should have the costs of the issues found in their favour:—

Held, that the questions, raised by the pleadings, whether the defendants had been guilty of negligence, and, if so, whether the money paid into court was sufficient, were distinct issues, and that the plaintiffs were entitled to their costs on the issue of negligence on which they had succeeded.

APPEAL from an order of a judge at chambers refusing to direct a review of taxation of costs.

The action was brought to recover damages for injuries received by the plaintiffs, and alleged to have arisen by reason of the negligence of the defendants. The defendants by their statement of defence denied that they had been guilty of negligence, and averred contributory negligence on the part of the plaintiffs. As an alternative defence, while denying liability, the defendants brought into court the sum of 80*l.*,

(1) 5 App. Cas. 588.

and said that the same was sufficient to satisfy the plaintiffs' claim. The plaintiffs did not take out the sum paid into court, and the action proceeded to trial before Lawrance J. with a jury. A verdict was found for the plaintiffs for 35*l.* damages, and judgment was entered on March 6, 1901, for the defendants with costs.

On a subsequent application to the learned judge he made the following order: "It is ordered that the judgment herein dated March 6, 1901, be varied, and that judgment be entered for the defendants; that 35*l.* be paid out of court to the plaintiffs and 45*l.* be paid out of court to the defendants. And it is further ordered that the plaintiffs have the costs of the action up to the time of payment into court. The defendants to have the general costs of the action from that time, and the plaintiffs to have the costs of the issues found in their favour."

Upon taxation of costs under this judgment the master allowed to the plaintiffs their costs relating to the question of negligence, on the ground that the plaintiffs had succeeded upon the issue of negligence, and that the order of the learned judge applied to that issue.

On appeal to Lawrance J. at chambers the learned judge declined to order a review of taxation.

The defendants appealed.

Hugo Young, K.C. (*C. B. Marriott* with him), for the defendants. No complaint is made of the form of the judgment, but the last clause, giving the plaintiffs the costs of the issues on which they succeeded, has no operation in this case. There may be cases in which, though a defendant succeeds in an action, some issues are found for the plaintiff, but this is not one of those cases. The only issue in this case was whether there had been negligence followed by damage, and the master was wrong in treating the case as if there were two distinct issues, the one of negligence and the other of damage, whereas in fact negligence and damage were merely two elements of one issue. The defendants put the plaintiffs in the position of getting all the damages to which they were entitled, and

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yet, if this mode of taxation is affirmed, the defendants will have to pay costs to the plaintiffs. This would be to defeat the object of the rules as to payment into court, and to deprive defendants who pay money into court of the benefits that the rules were intended to confer on them. [He cited *Goutard* v. *Carr* (1) and *Wheeler* v. *United Telephone Co.* (2)]

W. S. M. Knight, for the plaintiffs, was not called on.

COLLINS M.R. I am of opinion that this appeal should be dismissed. The defendants paid into court in the action a sum which they judged to be more than sufficient to cover any damages to which the plaintiffs could be entitled, but they could not make up their minds to stand by that defence alone, but went into court with two strings to their bow. They averred in the first place that they never came under any liability to the plaintiffs, and, secondly, that if there was any liability the amount paid into court was sufficient to meet it. Those averments raise distinct issues. To test the proposition put forward on the defendants' behalf, let me suppose that the jury had given the plaintiffs 500*l.* damages, but that the defendants had ultimately succeeded in shewing that there was no evidence of any negligence on their part. It would obviously have been open to them to do that, and they thus secured by their pleading an advantage that would not have been open to them but for the denial of liability. Having thus had the benefit of raising this issue, they must be content to accept the consequences now that they have failed upon it. I cannot agree with the contention that there is but one issue in the action divided by the pleadings into two separate limbs. Indeed, Mr. Young was obliged to admit to me that on his argument the position of a defendant who pays in with a denial of liability is precisely the same as to costs as that of one who pays in without such denial. This clearly cannot be the case. The issue on the averment of non-liability raises the question of the right of the plaintiffs to recover some damages, and the issue arising on the payment into court raises the question as to the amount recoverable if the defend-

(1) (1884) 13 Q. B. D. 598, n. (2) (1884) 13 Q. B. D. 597.

ants are liable. Such an issue could not have been raised in former days, but it can now be raised, and is a distinct issue from that of negligence or no negligence. On this last-mentioned issue the plaintiffs have succeeded, and they are entitled to the costs of it. We cannot on this appeal go into the question what those costs are, and the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The action, as appears by the statement of claim, is founded on the negligence of the defendants, and certain acts of negligence are alleged, and there is a statement of the damage said to have been suffered through those acts of negligence. The defence denies any negligence on the part of the defendants, and alleges contributory negligence, and, alternatively, the defendants, while denying liability, bring into court 80*l.* as sufficient to cover any claim of the plaintiffs. The plaintiffs did not think fit to take that sum out of court in satisfaction, and the trial resulted in their obtaining a verdict for a less amount. Upon this, judgment was entered for the defendants with the general costs of the action, but the judgment directs that the plaintiffs should have the costs of issues found in their favour. The question that arises is whether there are any issues which were found in the plaintiffs' favour. It seems to me, looking at the pleadings and the result of the trial, that two issues were found for the plaintiffs, namely, those arising on the allegations of negligence and contributory negligence. I do not propose to go into the question whether any other form of judgment could have been given, but, on the judgment as entered, I think it is clear that the plaintiffs are entitled to the costs of those two issues.

MATHEW L.J. The points raised in this action were—negligence, contributory negligence, and the amount of damages to which the plaintiffs would be entitled in the event of their succeeding in the action. The issues on the points so raised were before the jury, and witnesses were called to give evidence on those issues, and the effect of the judgment is to direct

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that the costs of issues are to be paid by the party who is unsuccessful. No question has been raised as to the judgment itself, and it seems clear that under that judgment the plaintiffs are entitled to have the costs incurred with relation to the issues of negligence and contributory negligence taxed in their favour.

Appeal dismissed.

Solicitors for plaintiffs: *F. Osbaldiston & Co., for Allen & Anderson, Nottingham.*

Solicitors for defendants: *Field, Roscoe & Co., for J. Storey, Leicester.*

A. M.

C. A. 1901 *Nov.* 27.

[IN THE COURT OF APPEAL.]

In re A SOLICITOR.

Practice—Solicitor—Annual Certificate—Registrar of Solicitors—Duty of Registrar—Discretion—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 23, 24.

Under s. 23 of the Solicitors Act, 1843, the registrar of solicitors has no discretion to refuse the certificate therein mentioned to an applicant who has complied with the requirements of the section, except in a case where he has reason to believe that the applicant for the certificate is not on the rolls; and the discretion of a judge on application to him under s. 24 of the Act by way of appeal from the refusal of a certificate by the registrar is similarly limited.

Observations in *Re An Application under the Solicitors Act*, 1843, (1899) 80 L. T. 720, disapproved of.

APPEAL from an order of a Divisional Court (Lord Alverstone C.J., Darling J., and Channell J.) dismissing an appeal from an order of Jelf J. at chambers.

The appellant, a solicitor, who had, since his admission, regularly taken out an annual certificate, and who was still on the rolls, applied to the respondents, the Incorporated Law Society, who by the Solicitors Act, 1843, are appointed to perform the duties of the registrar of solicitors, for a certificate under s. 23 of that Act.

The respondents refused to give him the certificate on the

ground that he was an undischarged bankrupt. He thereupon applied to Jelf J. at chambers under s. 24 of the Act for an order directing the respondents to give him the certificate.

The learned judge, acting on the authority of *Re An Application under the Solicitors Act*, 1843 (1), refused the application; and, on appeal from his decision, the Divisional Court, on the authority of the same case, dismissed the appeal.

Page, K.C. (*Muir Mackenzie* with him), for the appellant. The words of s. 23 of the Solicitors Act, 1843, are imperative, and give the registrar no discretion to withhold the certificate, except in a case where he has reason to believe that the applicant is not on the rolls. If the registrar refuses to issue the certificate, which it is his statutory duty to give under s. 23, then under s. 24 there is a right to apply to the Court or a judge or the Master of the Rolls, who are thereby "respectively authorized to make such order in the matter as shall be just." In *Re An Application under the Solicitors Act*, 1843 (1), it was held by Wills J. and Ridley J. that under these latter words of s. 24 the judge has power to inquire whether on general grounds the solicitor applying for a certificate is a person who in the interests of the public ought to be allowed to practise: that is to say that, the registrar having refused to perform his statutory duty, on an application to the judge to compel him to perform that duty, the judge may refuse to do so, on grounds entirely outside those upon which under s. 23 the registrar is entitled to refuse the certificate. It is submitted that that is really an impossible construction of the sections, and that the decision in the case of *Re An Application under the Solicitors Act*, 1843 (1), so far as it rests on the view so expressed, cannot be supported. In point of fact, that case really was one which came under s. 16 of the Solicitors Act, 1888 (51 & 52 Vict. c. 65). The effect of the suggested construction is that the judge may, by refusing to order the certificate to issue, in effect suspend the solicitor from practice without any of the steps

(1) 80 L. T. 720.

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required by statute in the case of an application to strike a solicitor off the rolls or to suspend him. The legislation subsequent to 1843 shews that the Legislature did not suppose that the provisions of the Solicitors Act, 1843, had the meaning which it is now sought to ascribe to them: for, if there were the general discretion to refuse a certificate under s. 23, which is contended for by the respondents, the provisions of s. 16 of the Solicitors Act, 1888, and those of s. 2 of the Solicitors Act, 1899 (62 & 63 Vict. c. 4), would have been wholly unnecessary. The words "such order as shall be just" in s. 24 merely mean such order as shall be right in point of law, and may be proper as regards costs or other matters, having regard to the circumstances under which the registrar has refused to perform his duty under s. 23.

Asquith, K.C. (*Hollams* with him), for the respondents. It is not suggested for the respondents that s. 23 gives a general discretion to the registrar to refuse to grant the certificate mentioned in that section. But s. 23 and s. 24 must be read together. Sect. 24 gives the statutory machinery by which the duty imposed on the registrar by s. 23 is to be enforced. If the contention of the appellant is right, and the duty of the judge under s. 24 is limited as suggested, there was no need for such a provision as is thereby made. The registrar might have been compelled to perform his statutory duty by mandamus. The respondents contend that the effect of the legislation contained in the two sections is, not that the registrar himself has a discretion to refuse the certificate on grounds other than that specified in s. 23, and for that purpose to inquire whether such grounds exist, but that, if he has information leading him to think the case a fit one for inquiry as to the propriety of issuing the certificate, he may hold his hand, and refer the applicant to the statutory machinery by way of application under s. 24 to the Court or a judge, who will on such an application have power to inquire into the case and make "such order in the matter as shall be just." The contention for the appellant really gives little or no effect to those latter words. The application under s. 24 is not by way of appeal from the registrar.

Page, K.C., in reply. The contention for the respondents really plays with the meaning of words. If the registrar has power to hold his hand, as suggested, under s. 23, he must in effect have the discretion which it is in terms admitted on the part of the respondents that he has not.

COLLINS M.R. I am of opinion that this appeal must be allowed. The judge at chambers acted upon the authority of *Re An Application under the Solicitors Act*, 1843 (1), and upon appeal from his order the Divisional Court also followed that decision. The question raised is, in substance, whether under s. 23 of the Solicitors Act, 1843, the registrar has a discretion to refuse the certificate mentioned by that section to a person who has conformed to the conditions therein laid down. The section provides that "the said registrar shall, after the expiration of six days after the delivery" of the declaration required by the first part of the section, "unless he shall see cause and have reason to believe that the party applying for such certificate is not upon the said roll of attorneys or solicitors, deliver to the said attorney or solicitor, or to his agent, on demand, a certificate" in the form set forth in the schedule. The words of the section imperatively require the registrar to give the certificate, except only in cases in which he has reason to believe that the party applying for it is not upon the rolls. That is the only qualification of the otherwise absolute terms of the enactment. It is admitted by the counsel for the respondents that the registrar has no discretion under s. 23 to refuse the certificate on any other ground than that mentioned in the section. He has therefore under the section, subject to that exception, a duty, which is ministerial and not judicial, to deliver to persons who are upon the roll of solicitors, and who have complied with the conditions mentioned in the section, the annual certificate by virtue of which they are authorized to practise. It was contended, however, for the respondents that the effect of s. 24, which gives a right of application to a judge in cases where the registrar refuses to perform his duty under

(1) 80 L. T. 720.

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s. 23, is in some way or other, notwithstanding that the duty of the registrar is such as I have stated, to confer on the judge the power of entering upon a general inquiry into matters relating to the conduct and character of the applicant, and thus, really, indirectly to enlarge the powers of the registrar. Ample machinery of an altogether different character is provided by statute for inquiring into such matters through the medium of the Incorporated Law Society; and I cannot see how, upon the terms of the sections to which I have referred, the judge can have conferred upon him the general jurisdiction for which the respondents contend. It seems to me impossible to suppose that the Legislature, having imposed a duty on the registrar, can have intended that, upon his refusal to perform it, and application being made to the judge to compel him to do so, there should be given to the judge a general jurisdiction to travel entirely outside of the scope of the registrar's mandate. The argument in favour of the suggested construction of the sections appears entirely to depend on the provision that the judge may "make such order in the matter as shall be just." There are certain matters with regard to which under s. 23 the registrar has power to inquire into the facts, and, if he makes a mistake in dealing with them, no doubt the judge can review his decision on such terms as may be just. For instance, if the applicant had in some way by his conduct misled the registrar, the judge might think it just to make some order that would involve his paying costs occasioned by such conduct. I think it is clear that the jurisdiction of the judge under s. 24 is limited to such matters as these. The suggestion for the respondents leads to the result that, if the judge once gets seisin of the case under s. 24, the matter is altogether at large and he has jurisdiction to go into the general question whether, having regard to all matters connected with the case, it is desirable that the applicant's certificate should be renewed. It is impossible to set any limit to the judge's jurisdiction, if it is not limited to the matters involved in s. 23. The consequence would be that, whenever the judge's jurisdiction was let in under s. 24, he would have a general jurisdiction in his discretion and without appeal to withhold

the certificate, and in effect to suspend the solicitor from practice—a proceeding for which, as I have said, another and quite different machinery has been provided by the law, with proper safeguards for complete inquiry, and also for appeal. It seems to me that this would be such an extraordinary result that I cannot adopt the suggested construction of s. 24. I think that the admission made by the respondents' counsel to the effect that he could not contend that under s. 23 any discretion was given to the registrar to refuse the certificate, except in the one case mentioned in the section, really amounts to a concession of the whole question raised in the case. The jurisdiction of the judge under s. 24 being based on that of the registrar under s. 23, it seems to me impossible to adopt the view that the Legislature intended that, because the registrar had contravened the law by exercising a discretion which was not given to him by s. 23 and refusing the certificate which he was bound to give, the judge should thereby obtain a jurisdiction under s. 24 enlarged beyond that of the registrar, and have an unlimited discretion with regard to the giving of the certificate. With the greatest deference to Wills J., I cannot adopt the view which he appears to have taken in *Re An Application under the Solicitors Act*, 1843. (1) The substantial effect of that view seems to me to be that the registrar would have a discretion with regard to issuing the certificate. I think also that the subsequent legislation contained in the enactments to which we have been referred is strongly against the view that the registrar has such a discretion, because, if he had, the provisions of those sections would have been unnecessary. For these reasons I think the appeal must be allowed.

STIRLING L.J. I am of the same opinion. If it were not for the fact that we are overruling the decision of a Divisional Court, I should add nothing to what the Master of the Rolls has said in this case. But, out of respect for the judges who decided the case of *Re An Application under the*

(1) 80 L. T. 720.

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Stirling L.J.

Solicitors Act, 1843 (1), I wish to indicate the reasons why I cannot agree with them. In that case a solicitor had been suspended for a period of two years, and, while so suspended, he had become bankrupt. When the period for which he had been suspended had expired, and while he was still an undischarged bankrupt, he applied for renewal of his certificate. The way in which Wills J. approached the consideration of the Act in that case was as follows: He said, after referring to the provisions of the Solicitors Act, 1843, and those of s. 16 of the Solicitors Act, 1888, "it would be as absurd and unsatisfactory a piece of legislation as one could imagine, that, where a man has simply failed at the proper time to take out his certificate, he should not be allowed to do so without inquiry, and without satisfying the Court that there is no reason why he should not be practically readmitted and put again in a position in which he is able to practise, where there is nothing known against him, and where he has merely failed to take out his certificate within the proper time, and yet that, in a case in which he has been guilty of grave offences which have brought upon him the very serious consequence of suspension from practice, he should have an absolute and unqualified right upon the expiration of the period of suspension to go back to practice. The proposition, when so stated, answers itself as far as reason and justice and legislation are concerned, and shews that nothing but the strongest possible words in an Act of Parliament could properly induce a Court to take such a view of the legislation." With the most unfeigned respect for the learned judge's opinion, I must say that I cannot agree with what he there says. It seems to me that the result of his view is this. A solicitor had been guilty of misconduct, which had been investigated by the appropriate tribunal, and that tribunal had decided that the proper punishment for his misconduct was suspension for two years and no longer. The Court had power to order his name to be struck off the rolls. In some cases I think the Courts have ordered the solicitor's name to be struck off the rolls, but have so far modified that

(1) 80 L. T. 720.

order as to give liberty, after a certain period, to apply to the Court for reinstatement. But in the case to which I am referring there was no order to strike the solicitor's name off the rolls, either with or without that modification. The order appears to have been simply that he should be suspended for two years, which meant, in my opinion, that, after that period, he should be at liberty to resume practice. But, according to the view of the Act taken by the learned judge, the registrar would have power to withhold the solicitor's certificate, and practically to inflict upon him a heavier punishment than that which the Court which investigated his conduct thought sufficient. I think that is not the true view of the Act, and I cannot find anything to justify it in the language of ss. 23 and 24. The whole basis of the reasoning of the learned judges in *Re An Application under the Solicitors Act*, 1843 (1), was the wide meaning attached by them to the words "make such order in the matter as shall be just." With all respect to them, I think that they extended too widely the meaning to be attached to those words.

Mathew L.J. I am of the same opinion. The Divisional Court held in *Re An Application under the Solicitors Act*, 1843 (1), that ss. 23 and 24 must be read together; and the view taken by the Court of the effect of the sections, when so read, appears in substance to have been that a discretion is given to the registrar under s. 23 by reason of the provisions of s. 24; in other words, that the light reflected back from s. 24 shews that s. 23 is to be read as meaning that the registrar shall issue the certificate, unless he has reason to believe that the applicant is not on the rolls, or unless he thinks him a person unfit to practise as a solicitor. I cannot agree with that view. It is, in my opinion, an extension of the meaning of s. 23 not warranted by the language used, which is perfectly plain and which imports that there is only one case in which the registrar is not bound to issue the certificate. The effect of s. 24 is merely that, if in such a case

(1) 80 L. T. 720.

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A Solicitor, *In re.*

Mathew L.J.

the registrar has come to the conclusion that the certificate should not be issued, the applicant may make an application by way of appeal to a judge, who may make an order for the issue of the certificate or such order as he thinks proper in the circumstances of the case. The interpretation put upon s. 24 by the Divisional Court would lead to the result that, although the elaborate machinery which is provided by statute for the investigation by the Court or the Master of the Rolls of charges of misconduct brought against solicitors through the Incorporated Law Society had been brought into operation, and the solicitor had on such proceedings been acquitted, nevertheless the registrar could subsequently refuse to issue a certificate, and submit to the judge under s. 24 the question whether the case had been rightly dealt with on those proceedings. It seems to me that such a result could not have been intended. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Leonard & Pilditch.*
Solicitor for respondents: *E. W. Williamson.*

E. L.

MELLOR'S TRUSTEE *v.* MAAS & CO.

1901
Nov. 7, 8.

Bankruptcy—Bill of Sale—Mortgage or Hire-purchase Agreement — Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9.

In 1899 A. contracted with B. to purchase an hotel and the chattels in and about the same for a lump sum of 30,000*l.* A., being short of money, went to C. and asked for a loan of 2000*l.* on a fourth mortgage of the hotel. C. declined the mortgage, and A. refused to give a bill of sale. On the morning of the day for completion of A.'s contract, C. went to B., told him that A. was short of money, and offered to buy the chattels for 2000*l.* B. accepted this offer, and C. paid him the money. C. then purported to sell the chattels to A. on a hire-purchase agreement for 2412*l.* 16*s.*, payable by instalments, and the purchase of the hotel was completed. The hire-purchase agreement was in common form and contained the usual licence to seize. In 1900 A. became bankrupt, and his trustee in bankruptcy claimed the chattels as part of the property of the bankrupt:—

Held, that the true inference from all the facts was that the 2000*l.* was a loan by C. to A. to enable him to complete his contract with B.; and that the hire-purchase agreement was a security for that loan and was void for want of registration under the Bills of Sale Acts.

Beckett v. *Tower Assets Co.*, [1891] 1 Q. B. 638, followed.

THIS was an action which raised the question whether a hire-purchase agreement of certain chattels was in effect a bill of sale within the meaning of the Bills of Sale Acts, and void for want of registration, under these circumstances.

By a written contract dated May 4, 1899, one Sykes agreed to sell to G. Mellor a freehold hotel at Leamington, known as the Crown Hotel, with the furniture, fixtures, and effects in and about the same, for the lump sum of 30,000*l.*; a deposit of 750*l.* was to be paid, and the purchase was to be completed on May 15, 1899. It was one of the terms of the contract that 27,000*l.* (part of the purchase-money) should be secured by first, second, and third mortgages on the hotel. The deposit was paid. An inventory of the chattels was made, and their value was agreed at 3000*l.* Prior to May 15 Mellor, who was short of money, wanted 2000*l.* to enable him to complete

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the purchase. He went to one Maas, a member of the defendant firm who were wine and spirit merchants, and told him he had bought the hotel and the value of the furniture, and asked for 2000*l.* on a fourth mortgage of the hotel. Maas declined a fourth mortgage, and Mellor refused to give a bill of sale. Maas then said the only way was for some one to purchase the chattels of Sykes and to sell them to him (Mellor) on a hire-purchase agreement. The contract of May 4 was not shewn to Maas.

On the morning of May 15 Maas called on Sykes, told him that Mellor was short of money, and proposed to purchase the chattels at the hotel for 2000*l.*; he also told Sykes that unless the chattels were sold to him in this way the purchase could not be completed. Sykes took Maas to his solicitor, and, after some discussion, Sykes agreed to sell the chattels to Maas for 2000*l.*, which sum Maas then paid and took the following receipt of Sykes:—

"Received this 15th day of May, 1899, of Messrs. Emil Pohl Maas & Co. the sum of two thousand pounds, being the purchase-money of the fixtures, fittings, furniture, plate, linen, and other effects comprised in the inventory dated 15th of May, 1899, made by Messrs. John Hart Bridges & Co. and signed by me.

"(Signed) R. D. Sykes."

Later the same day the purchase of the hotel was completed. The same day, but before completion of the purchase, Mellor signed with the defendant firm a hire-purchase agreement for the chattels for 2412*l.* 16*s.*, to be paid by instalments. This agreement contained the usual licence to seize on default in payment of any instalment. At the same time Mellor signed an agreement to purchase all his wine and spirits from the defendant firm. Some instalments under the hire-purchase agreement were paid; but in December, 1900, Mellor was adjudicated a bankrupt. The plaintiff, who was the trustee in bankruptcy, then brought this action against Maas & Co., claiming a declaration that the hire-purchase agreement was a bill of sale within the meaning of the Bills of Sale Acts, and

void for want of registration, and that he was entitled to the chattels as part of the estate of the bankrupt. By arrangement the chattels had been sold and realized 1750*l.*, which sum had been paid into a bank in joint names.

Muir Mackenzie and *H. J. Rowlands*, for the plaintiff. Mellor was the equitable owner of the chattels under the contract of May 4. The inception of the transaction between him and Maas was a borrowing, and the true inference from all the facts is that the 2000*l.* was a loan by the defendants to Mellor to enable him to complete the purchase, and that the hire-purchase agreement was intended to be a security for that loan. The principle of *Beckett* v. *Tower Assets Co.* (1) applies. *Madell* v. *Thomas* (2) and *In re Watson* (3) are also in point.

Reed, K.C., and *F. Mellor*, for the defendants. It is admitted that the real substance of the transaction must be looked at to arrive at its true nature; but the cases cited are distinguishable. The plaintiff has only the same rights as Mellor, and nothing more. Here, Mellor was not in the first instance the owner of the chattels. He had only a contractual right to them under the contract of May 4. What occurred was mutual rescission of that contract so far as the chattels were concerned, and an out and out purchase of them by the defendants. If the hire-purchase agreement is treated as cancelled, Mellor would not be the owner of the chattels.

Muir Mackenzie, in reply. There is no evidence of any mutual rescission of the contract of May 4, and there was not an independent out and out purchase of the chattels by the defendants on their own account. Mellor acquired the property in the chattels under the contract of May 4: *Coburn* v. *Collins*. (4) If the receipt and hire-purchase agreement are destroyed, Mellor remains the owner of the goods.

WRIGHT J. In this case the question is whether the defendants have the title to certain furniture, fixtures, and effects in

(1) [1891] 1 Q. B. 638.
(2) [1891] 1 Q. B. 230.
(3) (1890) 25 Q. B. D. 27.
(4) (1887) 35 Ch. D. 373.

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Wright J.

an hotel at Leamington, and it raises a somewhat nice question, more of fact than of law. I agree with Mr. Reed to this extent at any rate—that Sykes, the former owner of the hotel, had not at the time of this transaction, that is, at the time of the giving of the supposed bill of sale, parted with his title to the goods. It is not a case like *Coburn* v. *Collins*. (1) Sykes had given to Mellor only a contractual right to have a conveyance of the goods, which was contingent on payment by Mellor. Sykes was still, therefore, in a position to sell to the defendants. There might be a breach of contract, but even that would be avoided if the contract were altered by consent of all parties before breach, and, if in fact there was a real sale by Sykes to the defendant, it is immaterial for the purpose of the present case whether the hiring agreement is good or void, because, as Mr. Reed said, if void it would still leave the property in the defendants. The question is, Was there a real sale to the defendants in their own right? The object of all the parties was a loan on security; but Maas would not accept the security of a fourth mortgage, and Mellor refused to give a bill of sale. It was, therefore, proposed that Sykes should sell to the defendants, and that they should transfer to Mellor by way of hiring agreement. It is obvious that the sale to the defendants was to be solely for the purpose of such a transfer. It was to be a sale only on the terms of leaving the goods in the public-house for Mellor at the price of 2000*l*. No one can suppose that the defendants were to become absolute beneficial owners, free to remove the goods and deal with them as they pleased. Sykes would not have agreed to that, nor would Mellor have agreed to it. It would have defeated the common purpose of selling the business as a going concern. Nor was there any separation of the 30,000*l*., nor any fresh valuation. It seems to me clear that Sykes and Mellor could have prevented the defendants from removing the goods, or from selling to any one but Mellor. Under these circumstances, I think that the defendants must be regarded as trustees for Mellor, and Mellor as being the real owner, unless the property is taken out of

(1) 35 Ch. D. 373.

Mellor or charged by the hiring agreement. But, if Mellor is to be regarded as the real owner, then the hiring agreement was an assurance to the defendants or was an essential part of their title, and it operated as a licence by Mellor to the defendants to take possession of the goods as against Mellor's equitable interest, and it was a security for a loan. *Beckett* v. *Tower Assets Co.* (1) seems to me to be in point.

I should observe that Maas was not called by either side. I do not know that his evidence would have made much difference; but, in the absence of any evidence from him to the contrary, I feel less doubt as to the correctness of this inference of fact. The result is that the goods in question belong to the trustee. There must, therefore, be judgment for the plaintiff, and the money in the bank on the joint account must be paid out to him.

Solicitor for plaintiff: *Wellington Taylor, for Rowlands & Co., Birmingham.*

Solicitor for defendants: *E. Betteley.*

(1) [1891] 1 Q. B. 638.

H. L. F.

C. A.
1901
Nov. 29.

[IN THE COURT OF APPEAL.]

HAMILTON RUSSELL *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Settlement—Power of Appointment—Exemption—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 106, *Sched. I.*

By a settlement funds were to be held by trustees on certain specified trusts for the benefit of the settlor's children. The settlement contained a provision that the trustees might at the request of any of the children revoke the trusts concerning that child's settled share, and resettle that share for the benefit of a certain specified class of persons. Ad valorem duty was paid on that settlement under the Stamp Act, 1891, Sched. I., head "Settlement." Subsequently, at the request of the appellant, who was one of the children, and in contemplation of his marriage, the trustees by deed revoked the trusts of the original settlement concerning his share, and declared that during his life it should be held on trust to pay the income to him, and on his death should be transferred to the trustees of his marriage settlement, which was of even date, upon the trusts declared concerning the same in that settlement. By the marriage settlement, to which the trustees of the original settlement were not parties, the appellant's share was settled on trusts which were within the power of resettlement given to the trustees under the original settlement:—

Held, that the case was not one in which several instruments were executed for effecting a settlement of the same property within s. 106 of the Stamp Act, 1891; and that the marriage settlement was within the Stamp Act, 1891, Sched. I., head "Settlement," and not within the exemption therein of an "instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment," and that it was, therefore, liable to ad valorem stamp duty.

APPEAL from the judgment of a Divisional Court (Kennedy and Phillimore JJ.) upon a case stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891. (1)

On May 3, 1899, two unstamped instruments were presented on behalf of the appellant, the Hon. C. E. Hamilton Russell, to the Commissioners of Inland Revenue as to the stamp duty with which each of the instruments was chargeable.

The instruments were described as a deed of revocation and

(1) [1901] 2 K. B. 342.

a marriage settlement. Each of the instruments was dated April 10, 1899, and the question arose as to the stamp duty assessed on the marriage settlement.

By a settlement made on June 28, 1895, between Viscount Boyne of the one part and certain trustees therein named of the other part, after reciting that Lord Boyne was desirous of making an immediate provision for his five children, of whom the appellant C. E. Hamilton Russell was one, and that for that purpose he had transferred into the joint names of the trustees certain investments, it was agreed and declared that the trustees should stand possessed of those investments as from July 1, 1895, upon trust for the five children in equal shares, but so, nevertheless, that the settled share of each child should be held by the trustees upon the trusts and subject to certain powers and provisions therein set out.

The trusts of this settlement provided that the trustees should pay the income of each such child's settled share to such child during his or her life, and that, after his or her death, such child's settled share should be held upon trust for all or such one or more of the others of the said five children in such manner, and, if more than one, in such shares as such child should by will or codicil appoint, and that in default of appointment such child's settled share should accrue to and be held in trust for the others of the said five children then living in equal shares.

The settlement contained the following proviso: "Provided always that it shall be lawful for the trustees in their absolute discretion, at the request of any of the said five children, either in contemplation of marriage or subsequently to marriage, to revoke the trusts hereinbefore declared concerning such child's settled share, and by way of resettlement to declare such new or other trusts of and concerning the same as the trustees may think fit for the benefit of all or any to the exclusion of the others or other of the following persons, namely, such child, or any wife or husband of such child or such child's children or remoter issue, or the next of kin of such child, but not in favour of any other person or persons, and on any such resettlement such child's settled

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share may be transferred to trustees appointed by any such resettlement."

This settlement was stamped with ad valorem duty at the rate of 5*s.* for every 100*l.* of the amount or value of the property settled, and no question arose as to the duty paid thereon.

By a deed of revocation dated April 10, 1899, and made between the trustees of the settlement of 1895 of the first part, the appellant C. E. Hamilton Russell of the second part, and certain persons therein referred to as the marriage settlement trustees of the third part, after reciting that a marriage was intended to be solemnized between the appellant and Maria Lindsay Wood, and that it had been agreed that the one-fifth share of the appellant of and in the trust funds comprised in the settlement of 1895 should be, to the extent and in the manner thereinafter expressed, resettled under the power given to the trustees in that behalf by that settlement, it was witnessed that, at the request of the appellant, the trustees of the settlement of 1895 thereby revoked the trusts of that settlement concerning the one-fifth share of the appellant, and by way of resettlement declared that the said one-fifth share should from and after the solemnization of the intended marriage be held upon trust to pay the income to the appellant for life, and after his decease to pay or transfer, at such time and in such manner as was thereinafter agreed and declared, the capital of the said one-fifth share to the trustees of a deed already engrossed, and bearing, or intended to bear, even date, being the settlement to be made in contemplation of the intended marriage, to be held by those trustees upon the trusts and with and subject to the powers and provisions declared and contained concerning the same in the said marriage settlement.

This deed of revocation was stamped with the duty of 10*s.* according to the assessment of the Commissioners, and no question arose as to the duty paid thereon.

By another deed, also dated April 10, 1899 (being the marriage settlement in respect of which this case was stated), made between the appellant of the first part, the said Maria Lindsay Wood of the second part, Sir Lindsay Wood of the

third part, and the marriage settlement trustees of the fourth part, after reciting (in substance) that a marriage had been agreed on and was intended to be solemnized between the appellant and the said Maria Lindsay Wood, that, under the settlement of 1895, and the deed of revocation, the appellant's fifth share under the settlement of 1895 was held upon trust, after the marriage, to pay the income thereof to the intended husband for life, and after his decease to transfer the capital thereof to the marriage settlement trustees to be held by them upon the trusts, and with and subject to the powers and provisions thereinafter declared and contained concerning the same, and that upon treaty for the intended marriage it was agreed that such settlement should be made as was thereinafter contained, it was witnessed (inter alia) that, in pursuance of the said agreement and in consideration of the intended marriage, the intended husband, and the intended wife, and the said Sir Lindsay Wood did thereby respectively direct, and the marriage settlement trustees did thereby declare and agree with the other parties in manner following, namely, that after the death of the appellant the marriage settlement trustees should stand possessed of the one-fifth share of the funds comprised in and settled by the settlement of 1895, to be received from the trustees of that settlement (thereinafter referred to as the husband's trust fund), upon trust to pay the annual income thereof to the intended wife, M. L. Wood, during her life and during every coverture for her separate use and without power of anticipation, and after her death in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the intended marriage (such remoter issue to be born and take vested interests within twenty-one years from the death of the survivor of the intended husband and wife) at such time and in such shares and generally in such manner as the intended husband and the intended wife should by deed jointly appoint; and in default of and subject to any such appointment, then as the survivor should in like manner or by will appoint; and in default of and subject to any such appointment, in trust for the child, if only one, or all the children equally, if more than one, of the

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intended marriage who being male should attain the age of twenty-one years, or being female should attain that age or marry under it. The marriage settlement also contained a declaration that if there should be no child of the intended marriage who being male should attain the age of twenty-one years, or being female should attain that age or marry, then, subject to the trusts and powers therein declared and contained or by law vested in them, the marriage settlement trustees should stand possessed of the husband's trust fund upon such trusts as the appellant should by will appoint.

The marriage settlement further contained a declaration of trusts with regard to funds brought into settlement by Sir Lindsay Wood, and referred to as the wife's trust fund.

The Commissioners were of opinion that ad valorem duty was payable upon the marriage settlement under the head "Settlement" in Sched. I. of the Stamp Act, 1891, upon the amount or value of all the property thereby settled; but the appellant contended that the duty was not payable in respect of the husband's trust fund, and relied on the terms of the exemption under the same head. He submitted, therefore, that as regards the husband's trust fund the marriage settlement was chargeable with the fixed duty of 10*s.* only. The Commissioners, however, assessed the marriage settlement as chargeable in respect of that fund as well as the wife's trust fund with ad valorem settlement duty, but stated this case for the opinion of the Court. (1)

(1) By the 1st schedule to the Stamp Act, 1891 (54 & 55 Vict. c. 39), "Settlement. Any instrument, whether voluntary or upon any good or valuable consideration other than a bonâ fide pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects, or not) or any definite and certain amount of stock or any security, is settled or agreed to be settled in any manner whatsoever: For every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled . . . . 5*s.*

"Exemption. Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been

The Divisional Court held that the marriage settlement was liable to ad valorem duty in respect of the husband's trust fund. (1)

Ingpen, K.C. (*Dunham* with him), for the appellant. This case comes within s. 106 of the Stamp Act, 1891, which provides that, where several instruments are executed for effecting the settlement of the same property, and the ad valorem duty chargeable in respect of the settlement of the property exceeds 10*s.*, one only of the instruments is to be charged with the ad valorem duty. Here the original settlement of 1895 and the deeds of April 10, 1899, must be read together as effecting one settlement of the same property, and the ad valorem duty has already been paid on the settlement of 1895. It is clear law that an appointment must be read as if its provisions were inserted in the deed creating the power of appointment. Secondly, as regards the husband's trust fund, the instrument in question comes within the exemption under the head "Settlement" in the Stamp Act, 1891, Sched. I. It is really part of the appointment made under the power of revocation and resettlement given by the original settlement of 1895. It specifies the trusts upon which, after the death of the appellant, the property comprised in the deed of revocation is to be resettled, and is incorporated by reference in that deed. It is as if the deed of revocation and resettlement had referred to some writing, or document, such as a precedent in a book of conveyancing precedents, as shewing the trusts on which the property was to be resettled. In the case of schools or chapels property is sometimes conveyed on the trusts of a model deed. Could it be argued in such a case that the document referred to would require an ad valorem stamp? It can make no difference that, instead of its being a mere writing which is referred to, the incorporated terms are embodied in an instrument bearing the form of a marriage settlement. The property is not really "settled or agreed to

duly paid in respect of the same property upon the settlement creating the power, or the grant of representation of any will or testamentary instrument creating the power."

(1) See [1901] 2 K. B. 342.

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be settled" by virtue of the marriage settlement, for it was already settled by the deed of revocation and resettlement. If the marriage settlement, which is referred to as already engrossed, had never been executed, there would nevertheless have been a perfectly good resettlement by virtue of the deed of revocation. It can make no difference that the marriage settlement was afterwards executed by the parties thereto. If the trusts, which are set forth in the marriage settlement, had been specified in the deed of revocation and resettlement, it is clear that that instrument would have been within the exemption, and no ad valorem duty would then have been payable in respect of the husband's trust fund. It cannot be material that the power was executed by two instruments instead of one. All the instruments by which the power was executed must be looked on as one instrument for this purpose.

Rowlatt (*Sir R. B. Finlay*, *A.-G.*, with him), for the Crown. The provisions of s. 106 of the Stamp Act, 1891, contemplate a case where a settlement of property is effected, as one transaction taking place at the same time, by means of several instruments; not a case like this, where the same property is made the subject of different dispositions at different times.

The instrument in question is a marriage settlement in the ordinary form, by which property purports to be settled or agreed to be settled, and is therefore primâ facie within the Act; and it is not an instrument of appointment. It cannot be an instrument of appointment, for the donees of the power are not parties to it. It may be that, if the parties had chosen to have the new trusts with regard to the husband's trust fund declared in the deed of revocation and resettlement, no ad valorem duty would have been payable; but, if they choose to have another instrument executed, the legal purport of which is that property is thereby settled or agreed to be settled on certain trusts, then they must pay the duty which is by law imposed on such an instrument. In the case put of a conveyance on the trusts of a model deed or other precedent, no doubt it would be impossible to hold that an ad valorem stamp duty was payable on the document so referred to; but that is because it is not an instrument at all, and the Act imposes a duty, not

on transactions, but only on instruments which are the records of transactions: see per Collins L.J. in *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners*. (1) It is submitted that for the purposes of the stamp duty the legal purport of the instrument in question must be looked at. This instrument is in legal purport a marriage settlement, and therefore, unless it can be brought within the exemption, the ad valorem duty is payable. It does not purport to be, and cannot be, an appointment. The appointment had already been effectually made by the deed of revocation and resettlement; and the marriage settlement records as a separate instrument the agreement with regard to the trusts upon which the property was to be held after the marriage, and which were not set forth in the appointment. It is submitted that on such an instrument the ad valorem duty imposed by the Act is clearly payable.

Ingpen, K.C., in reply.

COLLINS M.R. I am of opinion that this appeal must be dismissed. The first question is whether the instrument, upon which ad valorem duty is claimed, is a settlement within the meaning of the word "settlement" as used in the schedule to the Stamp Act, 1891. A settlement is there defined as being "any instrument, whether voluntary or upon any good or valuable consideration, other than a bonâ fide pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects, or not) or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever." Does the instrument with which we have to deal come within that description, in which case, in order to be relieved from the duty, the appellant must bring it within the exemption to which I will presently refer? I think that the instrument is clearly one by which property is settled or agreed to be settled. It is in terms, and on the face of it, a marriage

(1) [1900] 1 Q. B. 310, at p. 319.

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settlement; and, though the deed of revocation is recited, and the property in question is referred to as being already settled, the instrument goes on to declare certain specific trusts, upon which the property is to be held after the death of the intended husband, there being a power of appointment given to the husband and wife, or the survivor of them, in favour of children or remoter issue of the marriage, and, in default of appointment, trusts in favour of children declared. It appears to me clear that this instrument is primâ facie a settlement within the meaning of the Act, and therefore, in order to be exempt from the ad valorem duty, it must be brought within the terms of the exemption mentioned in the schedule. To come within that exemption the instrument must be an "instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power, or the grant of representation of any will or testamentary instrument creating the power." It is contended that, rightly considered, the instrument in question comes within this exemption; because, although on its face it purports to be a settlement, it is really an instrument of appointment relating to property in favour of persons specially named or described as the objects of a power of appointment in a previous settlement upon which duty has been duly paid. I cannot agree with this contention. To begin with, I do not see how the instrument can come within the exemption, unless the donees of the power are parties to it, and thereby make an appointment; but the trustees of the settlement of 1895, to whom the power of revocation and resettlement was given, were not parties to this instrument; and the appointment under the settlement of 1895 was effected by the deed of revocation of even date, by virtue of which the property comprised in that deed was to be transferred to the trustees of the marriage settlement upon the death of the intended husband. We have here, therefore, an instrument which purports to be a marriage settlement, and not an appointment in any sense, the appointment having been made by a previous instrument,

and we have in that instrument provisions as to the disposition of the property after the death of the tenant for life, the intended husband, which are not to be found in the previous instrument. It was said that, in order to ascertain the trusts on which the marriage settlement trustees were to hold the property when transferred to them under the deed of revocation, the marriage settlement must be looked at; and that, the deed of revocation being within the exemption, the marriage settlement also was within it, because in the deed of revocation it was referred to for the purpose of ascertaining the trusts upon which the property was by the deed resettled: that it was as though, in an instrument of appointment itself exempt from duty, a particular precedent in some book of conveyancing precedents or some other document were referred to as containing the trusts upon which the property appointed was to be held. But, when we look at the document referred to in this case, we find that it is, as the counsel for the Crown pointed out, itself an instrument, and one which falls within the description of a "settlement" given by the Stamp Act, 1891. The case, therefore, comes to this—the parties have chosen, for their own convenience, to put into the form of a solemn instrument under seal the terms of the agreement made between them in contemplation of the intended marriage as to the disposition of the property when it should come into the hands of the trustees of the marriage settlement. They appear to have thought it convenient, for reasons which might readily be suggested, that the trusts with regard to this property after the marriage should be set forth in a separate instrument, and not in the deed of revocation. If they had been content that the revocation of the trusts of the original settlement and the declaration of the new trusts should be effected by the same deed, that deed might have been within the exemption. But they were not so content, and preferred to have a marriage settlement drawn up in the usual way, and the trusts as to the property embodied in that settlement. That instrument cannot be an appointment, because the donees of the power of appointment are not parties to it. It cannot, in my opinion, be treated as a mere writing incorporated by reference in the deed of

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appointment. The parties have chosen to embody the trusts on which the property is agreed to be settled in a solemn instrument, which is within the description of a "settlement" given by the Act, and is not within the terms of the exemption. For these reasons I think the main contention of the appellant fails.

Another point was taken to which I ought to refer, namely, that this case falls within the terms of s. 106 of the Stamp Act, 1891, which provides that, where several instruments are executed for effecting the settlement of the same property, and the ad valorem duty chargeable in respect of the settlement of the property exceeds 10*s*., one only of the instruments is to be charged with the ad valorem duty. I think that this point was effectively met by the answer given by the counsel for the Crown, who said that the section contemplated one transaction by way of settlement of property effected at the same time by several documents, not a series of documents effecting at different stages different dispositions with regard to settled property. I do not think the Legislature could have intended by that section to embrace the case of a settlement giving a power of revocation and appointment which is subsequently executed so as to effect what is really a fresh settlement. If the view of s. 106 contended for by the appellant were correct, there would seem to have been no need for the exemption contained in the schedule.

STIRLING L.J. I am of the same opinion. The question is whether the Crown has made out a title to ad valorem duty in respect of the instrument of April 10, 1899, referred to as the marriage settlement. It is sought by the Crown to charge that instrument with duty as being a "settlement" within the meaning of the Stamp Act, 1891. A settlement is by that Act described as being "any instrument by which any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not) or any definite and certain amount of stock, or any security, is settled or agreed to be settled in

any manner whatsoever." Reading the document by itself, is it such an instrument, i.e., one by which the property therein referred to is settled or agreed to be settled? The parties to it are the intended husband and wife, Sir Lindsay Wood, and the trustees of the marriage settlement. It recites that under the original settlement of 1895 and a deed supplemental thereto, being the deed of revocation, one fifth share of the trust funds comprised in the settlement of 1895 is held on trust, after the solemnization of the intended marriage, to pay the income thereof to the intended husband during his life, and, after his decease, to pay or transfer the capital of the said fifth share to the trustees or trustee of the marriage settlement to be held upon the trusts, and with and subject to the powers and provisions thereinafter declared and contained concerning the same; it further recites that, upon the treaty for the intended marriage, it was agreed that such settlement should be made as thereinafter contained; and then it witnesses that, in pursuance of the said agreement and in consideration of the intended marriage, the intended husband, the intended wife, and Sir Lindsay Wood do thereby respectively direct, and the marriage settlement trustees do thereby declare and agree with the other parties in manner following; and then follow clauses containing a declaration of the trusts upon which the property is to be held by the marriage settlement trustees after the death of the intended husband. Upon the face of it, the document read by itself is clearly an instrument by which property is settled or agreed to be settled; perhaps it would be more correct to say the latter, because the property is treated as already in settlement; and therefore the instrument is primâ facie a settlement upon which ad valorem duty is made payable under the Act. That being so, the next question is whether it comes within the exemption in favour of "an instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment." For the purpose of answering that question it is necessary to consider the terms of the power given by the original settlement of 1895 and what was done in the exercise of that power. The settlement of 1895 was

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one by which property was settled in favour of the five children of the settlor in equal shares, and it is thereby provided that "it shall be lawful for the trustees of the settlement in their absolute discretion, at the request of any of the said five children, either in contemplation of marriage, or subsequently to marriage, to revoke the trusts declared concerning such child's settled share, and by way of resettlement to declare such new or other trusts of and concerning the same as the trustees may think fit for the benefit of all or any to the exclusion of the others or other of the following persons, namely, such child, or any wife or husband of such child, or such child's children, or remoter issue or the next of kin of such child, but not in favour of any other person or persons, and on any such resettlement such child's settled share may be transferred to trustees appointed by any such resettlement." In contemplation of the appellant's marriage the trustees of the settlement of 1895 exercised this power by a deed of even date with the marriage settlement of April 10, 1899. The parties to the deed of revocation were the trustees of the settlement of 1895 of the first part, the intended husband of the second part, and the trustees of the marriage settlement of April 10, 1899, of the third part, but not the intended wife or Sir Lindsay Wood, who on the marriage brought into settlement a very considerable sum. By the deed the trustees of the settlement of 1895 revoked the trusts relating to the intended husband's share of the property comprised in that settlement, and declared that that share should, after the marriage, be held in trust to pay the income thereof to the intended husband for life, and, after his death, to transfer the capital thereof, or the investments representing it, to the trustees of a deed already engrossed, bearing or intended to bear even date with the deed of revocation, being the marriage settlement afterwards executed. It appears to me that the deed of revocation was an effectual resettlement of the intended husband's share. It is true that it does not itself state the trusts upon which the property was to be held by the trustees of the marriage settlement, but it refers to an existing written document in which all those trusts are declared. If that written document had

never been executed, still the deed of revocation would have been an effectual declaration of trust, and the document engrossed and intended to be executed might, although not executed, have been referred to for the purpose of ascertaining the trusts upon which the property was to be held. But the matter did not rest there. The document referred to as already engrossed was executed, and we must consider that document in order to see what the effect of it was. As I have already stated, I think that it comes within the definition of a settlement for the purposes of the Stamp Act, 1891; and I do not think that it comes within the exemption mentioned in that Act. The deed of revocation and resettlement was within that exemption. It was an effective instrument of appointment relating to property in favour of persons specially named or described as the objects of a power of appointment, and therefore came within the terms of the exemption from ad valorem stamp duty. But that does not in my opinion bar the claim of the Crown for ad valorem duty on the marriage settlement as an instrument by which property was agreed to be settled. It was fairly admitted by the counsel for the Crown that, if the trusts on which the property was agreed to be settled by the marriage settlement had been stated in the deed of revocation and resettlement, the ad valorem duty might not have been payable. But that course was not taken. The parties in their respective interests thought it desirable to enter into a separate solemn agreement as to the trusts on which the property was to be held after the death of the intended husband, and I think that, in respect of the document in which that agreement was embodied, they have made themselves liable to the ad valorem duty imposed upon a settlement by the Stamp Act, 1891. With regard to the effect of s. 106, I do not desire to add anything to what the Master of the Rolls has said.

MATHEW L.J. I am of the same opinion. I think that the parties who executed the marriage settlement of April 10, 1899, intended to execute such an instrument as comes within the definition of a settlement given by the Stamp Act, 1891—that

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is to say, an instrument by which property was agreed to be settled upon certain trusts. They might, if they had thought fit, have had all the trust limitations which were set out in the marriage settlement set out in the deed of revocation, and then probably there would have been no ad valorem duty payable in respect of the husband's trust fund. But they did not take that course. They took what was very probably a more convenient course under the circumstances—that is to say, they had a marriage settlement executed, from the terms of which the trustees of the marriage settlement might, after the marriage was solemnized, know what were their duties and the trusts on which they held the property. But the result appears to me to follow that, the instrument being one which is a settlement within the definition in the schedule of the Act of 1891, and not one which comes within the terms of the exemption thereby created, the ad valorem duty is payable upon it.

Appeal dismissed.

Solicitors for appellant: *Tarry, Sherlock & King.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

E. L.

SOAMES *v.* NICHOLSON.

1901
Nov. 12.

Landlord and Tenant—Notice to Quit—Validity of Notice.

An agreement of tenancy provided that the tenancy should commence on May 1, 1895, and that the rent should be payable quarterly on May 1, August 1, November 1, and February 1, "subject to three months' notice on either side at any time to terminate this agreement." The lessor on January 24, 1901, gave the tenant three months' notice to quit on April 25:—

Held, that the notice to quit was good.

APPEAL from the county court of Denbighshire.

By an agreement of tenancy, whereby the plaintiff agreed to let to the defendant a public-house, it was provided that the tenancy should commence "from the first day of May, 1895, at yearly rent of 40*l.* payable by equal payments every three months, in advance if required, on the first day of May, the first day of August, the first day of November, and the first day of February in each year, ... subject to three months' notice on either side at any time to terminate this agreement." The plaintiff on January 24, 1901, gave the defendant three months' notice to quit and deliver up the premises on April 25, 1901. The defendant having refused to quit, the plaintiff brought his action to recover possession. The county court judge held that the notice to quit was bad, not being a notice to quit on one of the quarter-days mentioned in the agreement, and gave judgment for the defendant. The plaintiff appealed.

Bryn Roberts, for the plaintiff. The county court judge went upon the authority of *Kemp* v. *Derrett* (1), where the tenant, whose tenancy commenced on October 29, was "always to be subject to quit at three months' notice"; and Lord Ellenborough held that a valid notice could only be given to quit on the 29th of January, April, July, or October, and that

(1) (1814) 3 Camp. 510; 14 R. R. 820.

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a notice to quit at Christmas was bad. But there the word "always" was held to mean merely that the tenancy was a quarterly one and not a yearly tenancy, and to entitle the parties to determine the tenancy at any one of the quarter-days above named. But here the words "at any time" have reference to the date at which the tenancy may be determined. In *Bridges* v. *Potts* (1), where the tenant under a mining agreement was to be at liberty "at any time thereafter" to determine the agreement on giving six months' notice, it was held that a six months' notice to expire at any time was sufficient. [He also referred to *Doe* v. *Grafton*. (2)]

Ellis Griffiths (*S. Moss* with him), for the defendant. The case is covered by *Kemp* v. *Derrett* (3), which case is treated by the Court of Appeal in *Sidebotham* v. *Holland* (4) as being good law. The case of *Bridges* v. *Potts* (1) turned upon special provisions in the agreement.

LORD ALVERSTONE C.J. In this case the county court judge decided that a notice to quit on April 25 was a bad notice, upon the ground that it did not expire on one of the quarter-days mentioned in the agreement. Obviously there is no magic in those particular days, for they are not the customary quarter-days on which tenants usually give up their tenancies. In order to determine what the parties really intended, it is necessary to examine the language of the agreement. It provides that the tenancy is to commence on May 1, at a yearly rent payable quarterly on May 1, August 1, November 1, and February 1, subject to three months' notice on either side "at any time" to terminate the agreement. No doubt the general rule is that in the case of a yearly tenancy, where nothing is said about the time at which it is to be determined, it can only be put an end to by a notice expiring at the date corresponding to that of its commencement. But, if the parties choose to do so, they may stipulate that they shall be at liberty to put an end to the tenancy by a notice expiring at any time. The question is whether they have done so here.

(1) (1864) 17 C. B. (N.S.) 314.
(2) (1852) 18 Q. B. 496.
(3) 3 Camp. 510; 14 R. R. 820.
(4) [1895] 1 Q. B. 378, at p. 383.

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SOAMES v. NICHOLSON.

Lord Alverstone C.J.

I think they have. There is no special reason why the tenancy should be determinable at one of the four days named. The decision in *Bridges* v. *Potts* (1), which turned on language practically identical with that in the agreement before us, really covers this case. It is said that that case is only to be supported because of the very special provisions in the agreement; but I do not think that that is so. I can see no special provision in that case which does not equally exist here. I think that the county court judge here was wrong, and that the appeal must be allowed.

DARLING J. I am of the same opinion.

CHANNELL J. I agree. It seems to me impossible to put any construction upon the words "at any time" except that which has been put upon them by my Lord.

Appeal allowed.

Solicitor for plaintiff: *Wynn Evans, Wrexham.*

Solicitors for defendant: *Buck & Co., for S. P. Bevon, Wrexham.*

(1) 17 C. B. (N.S.) 314.

J. F. C.

1901
Nov. 18.

GENTEL, Appellant; RAPPS, Respondent.

By-law—Validity—Use of Offensive Language in Tramcars—By-laws for Prevention of Nuisances—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 46.

The Tramways Act, 1870, s. 46, enables the promoters of any tramway to make by-laws for the prevention of nuisances in any carriage belonging to them. The promoters of a tramway made a by-law providing: "No person shall swear or use offensive or obscene language whilst in or upon any carriage":—

Held, that the by-law was valid although it did not contain any such additional words as "so as to be a nuisance or annoyance to others."

Case stated, under the Summary Jurisdiction Acts, by two justices of the peace for the city and county of Bristol.

The following material facts were stated in the case:—

At a court of summary jurisdiction, held in and for the city and county of Bristol, the respondent appeared to answer an information preferred against him by the appellant, charging that he (the respondent) in one of the streets in Bristol, being then in a carriage using a tramway then belonging to the Bristol Tramways and Carriage Company, Limited, unlawfully used obscene or offensive language, contrary to by-laws made under the Tramways Act, 1870. (1)

The by-laws were made by the promoters of the tramway

(1) The Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 46: "Subject to the provisions of the special Act authorizing any tramway and this Act, ...

"The promoters of any tramway and their lessees may from time to time make regulations,—

"For preventing the commission of any nuisance in or upon any carriage, or in or against any premises belonging to them:

"For regulating the travelling in or upon any carriage belonging to them.

"And for better enforcing the observance of all or any of such regulations, it shall be lawful for such . . . . promoters . . . . to make by-laws for all or any of the aforesaid purposes . . . . provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect."

Sect. 46 also provides for the publication, by advertisement, of notice of the making of any by-law under the provisions of the Act, and gives the Board of Trade power to disallow any by-law.

Sect. 47: "Any such by-law may impose reasonable penalties for offences against the same, not exceeding forty shillings for each offence. . . ."

referred to in the information, who are the Bristol Tramways and Carriage Company, Limited. No. 6 of the by-laws was: "No person shall swear or use offensive or obscene language whilst in or upon any carriage, or commit any nuisance in or upon or against any carriage, or wilfully interfere with the comfort of any passenger."

The clauses headed, "With respect to obstructions and nuisances in streets," of the Town Police Clauses Act, 1847, are in operation and apply to the whole of the city and county of Bristol. (1)

A local Act, passed in 1840, is in operation in the city of Bristol. It provides that "every person who shall . . . . use any . . . . obscene language to the annoyance of the inhabitants or passengers" within the city shall be liable to a penalty.

It was proved on the hearing of the information that the respondent, whilst in a carriage on a tramway belonging to the Bristol Tramways and Carriage Company, Limited, used obscene and offensive language to the conductor of the car. There were two other passengers on the car, who did not hear the language. The justices came to the conclusion that they were bound by the decision in *Strickland* v. *Hayes* (2), and that as no such words as "to the annoyance of the passengers" were embodied in the by-law, it was ultra vires. They accordingly dismissed the information.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

Macmorran, K.C. (*H. H. Gregory* with him), for the appellant. The justices were wrong in coming to the conclusion that they were bound, in consequence of the decision in *Strickland* v. *Hayes* (2), to hold this by-law bad. That decision is

(1) The Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28: "Every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall be liable to a penalty not exceeding forty shillings for each offence . . . ." A great number of offences are set forth in the section, one of which is: "Every person who . . . . uses any profane or obscene language."

(2) [1896] 1 Q. B. 290.

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doubtful, although it may, perhaps, be supported on the ground stated by Lindley M.R. in *Thomas* v. *Sutters* (1)—namely, that the by-law dealt precisely with a matter with which Parliament had already dealt in an Act addressed to the very same thing. The by-law here deals with offences in tramcars, not in streets; it is not repugnant to the provisions of the Towns Police Clauses Act, 1847, or of the local Act, which deal with different subject-matters. It need not specify that the act which is forbidden should be a "nuisance" or an "annoyance" to others. It is for the tramway authority, in framing by-laws under the Tramways Act, 1870, to say what acts are nuisances in their tramcars. The cases with respect to by-laws prohibiting betting in streets or public places—*Burnett* v. *Berry* (2) and *White* v. *Morley* (3)—support that view; so does the judgment in *Mantle* v. *Jordan* (4), with respect to a by-law made "for good rule and government" under the Municipal Corporations Act, 1882. In *Burnett* v. *Berry* (2) Lord Russell of Killowen C.J. and Wright J. both say that, if Lindley L.J. meant, in *Strickland* v. *Hayes* (5), that by-laws can only prohibit acts which are made offences, or are nuisances, by the general law, they doubt whether he was right. The decision in *Kruse* v. *Johnson* (6) is, in principle, against the authority of *Strickland* v. *Hayes*. (5)

F. P. M. Schiller, for the respondent. The justices came to a right conclusion. This case is governed by the decision in *Strickland* v. *Hayes*. (5) A by-law cannot enlarge the scope of the general law. There is no offence of swearing or using bad language in private places, nor even of swearing or using bad language in streets unless it be done to the annoyance of the public. The cases which have been cited with respect to by-laws prohibiting betting in streets do not apply; the words of the statute under which those by-laws were made are of a much wider character than the statute in question here, which is only directed to prohibiting nuisances. To swear in a tramcar is not necessarily a nuisance; it only becomes so when

(1) [1900] 1 Ch. 10, at p. 14.
(2) [1896] 1 Q. B. 641.
(3) [1899] 2 Q. B. 34.
(4) [1897] 1 Q. B. 248.
(5) [1896] 1 Q. B. 290.
(6) [1898] 2 Q. B. 91.

done to the annoyance of others. In this case the conductor was the only person who heard the respondent use bad language, and there is no evidence that anybody was in fact annoyed by it. One of the main grounds of the decision in *Kruse* v. *Johnson* (1) was that the by-law was made by a public representative body. That does not apply to this by-law, which was made by the promoters of the tramway.

Macmorran, K.C., was not called on to reply.

LORD ALVERSTONE C.J. I am of opinion that the magistrates ought in this case to have held the by-law valid, and that the principle upon which they proceeded—namely, that a conviction could not be maintained under the by-law, because it was made ultra vires—is not sound. If *Strickland* v. *Hayes* (2) is to be understood as deciding more than that a by-law could not make the same offence which is dealt with by an Act of Parliament another and a different offence, then I think that the decision was wrong. In other words, I think it was wrong if it meant to negative the proposition that, where the Legislature has constituted some authority the authority to make by-laws with respect to what may be a nuisance in a particular place, the decision of what is a nuisance in that place rests with the authority, and a by-law made by them which deals with a particular thing as being a nuisance is not necessarily ultra vires. I think that Lindley L.J. in dealing with the by-law in *Strickland* v. *Hayes* (2) really meant to express the same thing. In commenting upon the by-law there he said (3): "It is, however, very important that by-laws should not go beyond the powers of those who make them. Now, s. 16 of the Local Government Act, 1888, under which these by-laws are made, incorporates s. 23 of the Municipal Corporations Act, 1882. Looking at that section, I cannot find that it was intended to give power to make by-laws creating any new criminal offence. Of course, by-laws must do more than merely reiterate the provisions of Acts of Parliament; otherwise they would be nugatory; but it is

(1) [1898] 2 Q. B. 91. (2) [1896] 1 Q. B. 290.
(3) [1896] 1 Q. B. 292.

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important to see that they are strictly within the authority under which they were made." The judgments in *Kruse* v. *Johnson* (1), and the cases decided with respect to by-laws prohibiting betting, recognise the right of the authority, entrusted with the power of making by-laws to prohibit acts which may be nuisances, to define and describe what shall be a nuisance under particular circumstances. For example, one of the acts which may be prohibited by by-laws is the keeping of pigs within a certain distance from a dwelling-house. Here the Legislature have entrusted to the tramway company a power, subject to the control of the Board of Trade, to make by-laws "for preventing the commission of any nuisance in or upon any carriage, or in or against any premises belonging to them," and "for regulating the travelling in or upon any carriage belonging to them." I think it was quite within the authority of such a body, entrusted with that power, to say that particular acts done in a tramcar should be prohibited as nuisances, although if done elsewhere they would not be nuisances in a legal sense. Acts such as smoking or playing musical instruments in a tramcar are instances. No public interest is affected by prohibiting them, and no private right is seriously invaded. I think it would be dangerous to extend the doctrine of *Strickland* v. *Hayes* (2), and to say that this by-law was bad because words such as "to the annoyance of passengers" were not in it. When one comes to look at the Towns Police Clauses Act, 1847, it is clear that the statute does not intend to deal with or affect the power to make by-laws under special circumstances and dealing with particular places.

I am of opinion, therefore, that we ought to answer the question asked in the case in favour of the appellant, and that the case should be sent back to the magistrates accordingly.

DARLING J. I am of the same opinion. In view of the decisions since the case of *Strickland* v. *Hayes* (2), and particularly in view of the decision in *Kruse* v. *Johnson* (1), I do not think that *Strickland* v. *Hayes* (2) can be regarded as an

(1) [1898] 2 Q. B. 91. (2) [1896] 1 Q. B. 290.

undoubted authority for the propositions which it proposes to lay down. Here the power given to the tramway company was to make by-laws for preventing the commission of any nuisance in any of the carriages belonging to them. Under that power they made a by-law prohibiting persons from swearing or using obscene or offensive language whilst in the carriages of the tramway company. It is said that that by-law was ultra vires. I think it was not, for these reasons: They had power by statute to prohibit nuisances in their carriages. The by-law deals with certain things which are called nuisances; and, if things are forbidden which may reasonably and properly be called nuisances in the particular place, then that which the statute intended should be done has been done. The by-law must of necessity go beyond the statute in the sense that it must enumerate particular things which are not enumerated in the statute. I think that this by-law is a reasonable and proper one, although it does not contain any such words as "to the annoyance of others," because it would be intolerable that persons who have been annoyed by obscene or offensive language in a tramcar should be obliged to suffer annoyance again by having to repeat that language before a magistrate. I am of opinion that this by-law is such as the statute contemplates may be made.

CHANNELL J. I am of the same opinion. I think that the recent cases have clearly settled that, where an authority, or body of persons, have been given power to make by-laws for the preventing of nuisances, they have also power to declare that particular things, if capable of being nuisances, are when done in their district nuisances. The very power which is given to them involves their having authority to say what, in particular places and under particular circumstances, shall be nuisances. I do not think they need add in their by-law words such as "so as to be a nuisance or annoyance to other persons." There are obvious reasons why words of that kind should not be added, except, possibly, where the by-law applies to a very large area; so that what is a nuisance in one part of it may possibly not be so in another. On the question of repugnancy

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Channell J.

I repeat what I have said before. A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land. I say "by necessary implication" because I have in mind the cases with respect to by-laws prohibiting persons from travelling on railways without a ticket. In those cases by-laws which impose the same penalty as the general law without making a fraudulent intention part of the description of the offence have been held to be bad, because the statute creating the offence says that there must be a fraudulent intention on the part of the person charged with travelling without a ticket, and the by-law, therefore, by implication alters the general law. Again, a by-law is repugnant if it adds something inconsistent with the provisions of a statute creating the same offence; but if it adds something not inconsistent, that is not sufficient to make the by-law bad as repugnant.

Judgment for the appellant.

Solicitors for appellant: *Thomas White & Sons, for Stanley, Wasbrough & Doggett, Bristol.*

Solicitors for respondent: *Hare & Co., for E. J. Watson, Bristol.*

W. A.

WISE, Appellant; DUNNING, Respondent.

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Nov. 19, 20.

Justices — Jurisdiction — Recognizances to be of Good Behaviour — Public Meetings—Use of Insulting Language—Apprehended Breaches of the Peace.

The appellant, a Protestant lecturer, had held meetings in public places in the town of Liverpool, causing large crowds to assemble and obstruct the thoroughfares. In addressing those meetings, he used gestures and language which were highly insulting to the religion of the Roman Catholic inhabitants, of whom there is a large body in Liverpool. The natural consequence of his words and conduct on those occasions was to cause, and his words and conduct had in fact caused, breaches of the peace to be committed by his opponents and supporters, and he threatened and intended to hold similar meetings in the town, and to act and speak in a similar way, in the future. At one of the meetings he told his supporters that he had been informed that the Catholics were going to bring sticks; and, on some of his supporters saying that they would bring sticks too, he said that he looked to them for protection. A local Act in force in Liverpool prohibits, under a penalty, the use of threatening, abusive, and insulting words and behaviour in the streets whereby a breach of the peace may be occasioned:—

Held, that, on proof of those facts before the Liverpool stipendiary magistrate, he had jurisdiction to bind over the appellant in recognizances to be of good behaviour.

Semble, justices have jurisdiction to bind over to be of good behaviour a person who, in addressing meetings in public places, although he does not directly incite to the commission of breaches of the peace, uses language the natural consequence of which is that breaches of the peace will be committed by others, and who intends to hold similar meetings, and use similar language, in the future.

Case stated, under the Summary Jurisdiction Acts, by the stipendiary magistrate for the city of Liverpool.

The appellant was summoned to appear before the magistrate to answer an information preferred by the respondent, the assistant head constable of the city of Liverpool, stating that the appellant had held meetings on sundry dates in the month of May, 1901, on the King's highway and sundry other places within the city to which the public had access, and that breaches of the peace had taken place in consequence of the holding of those meetings, and that the respondent had reason to believe that the appellant intended to hold similar meetings

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in the future, and that if such meetings were addressed by the appellant in the King's highway, or in other places within the city to which the public had access, serious breaches of the peace would follow, and praying that the appellant might be summoned to shew cause why he should not be ordered to find sufficient sureties to keep the peace towards all His Majesty's subjects, and be of good behaviour, during the next twelve months.

The facts proved before the magistrate at the hearing of the information were stated and founded by him as follows:—

The appellant addressed a meeting held in Islington Square, Liverpool, which square is a public place, a public thoroughfare, and part of the King's highway, on May 15, 1901, and the following night addressed a similar meeting held in the same place.

The meetings so held and addressed by the appellant, and other meetings herein referred to, were held by him with the view of prosecuting what is called a "crusade" in the interests of the Protestant religion.

Each of these meetings was attended by a number of persons of the Roman Catholic religion, in addition to the Protestant supporters of the appellant. The crowd of people present on the evening of May 16 was so large that Carver Street, a public street running into Islington Square, was completely blocked, and the main public streets on each side of the square were filled with the overflow of people from the meeting. At the meeting held on May 16 the appellant, in the course of his speech, put beads round his neck and waved a crucifix above his head. Those gestures, and the language then used by him, were such as were likely to insult and annoy the Roman Catholics, and were well calculated to provoke a breach of the peace by them, and did in fact result in a breach of the peace, as at the conclusion of the meeting a breach of the peace was committed by the opponents of the appellant, who made a determined rush for him, and it was only by the intervention of members of the police force that he was got away in safety. The appellant did not himself commit any breach of the peace, nor did he incite his supporters to do so, but his language and

gestures did in fact provoke other persons present to do so. At this meeting the supporters of the appellant said, "Let us charge them"; but the appellant restrained them, saying, "Stand still; stand still."

The appellant also held a meeting on Sunday morning, May 19, 1901, at the corner of Boaler Street and Shiel Road, which are public thoroughfares and part of the King's highway in the same city; and just before addressing that meeting the appellant remarked that he was about to "denounce" the infamous Order of Jesuits and the Coronation Oath. At the same meeting the appellant called the Roman Catholics "rednecks," which is a name most insulting to them, and he challenged any one of them to get up and deny the truth of any of his remarks. The term "rednecks" was intended to annoy and insult the Roman Catholics, and was well calculated to provoke a breach of the peace, and a breach of the peace did take place, and a number of stones were thrown, and fights took place amongst those attending the meeting, and the police had to interfere and separate them. The meeting afterwards broke up; but, prior to it doing so, the appellant asked those present to support him at another meeting to be held at Islington Square the following Saturday at 8 P.M. On being requested to alter the hour of that meeting to 7.30, the appellant replied, "Yes; the sooner we get at them the better." The appellant did not at that meeting commit any breach of the peace, nor incite his supporters to do so, but by his language above mentioned he in fact provoked other persons present to do so. At this meeting the appellant asked his own supporters not to assault any one.

At a meeting held and addressed by the appellant on May 22, 1901, in Mere Lane, which is a public thoroughfare and part of the King's highway in the same city, the appellant, in referring to the meeting which was to be held on the following Saturday, May 25, said that, as he had heard the "Catholics" were going to hold a meeting at the same place at 8 P.M., he thought his meeting should be at 7.30 P.M. He also said that he had received a letter informing him that the Catholics were going to bring sticks; upon which some of

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his supporters said they would bring sticks also. He also told his supporters that the police had refused to give him protection, and so he looked to them to protect him.

In the Liverpool *Evening Express* newspaper of May 24, 1901, the following advertisement, which was admitted by the appellant to have been inserted by him, appeared: "Protestantism and Free Speech. Do not allow the Romanists to triumph, but maintain your liberties. Support Mr. George Wise on Saturday next, 7.30, at Islington Square." In consequence of the disturbances which took place at the meetings above mentioned, an information and complaint was laid before me by the respondent, similar to the information and complaint now in question, in respect of the above meetings, and on the hearing of that information and complaint before me on May 25, 1901, an undertaking was given by the solicitor of the appellant on his behalf that he would not hold the meeting then advertised and above referred to.

The undertaking referred to in the preceding paragraph only referred to the meeting to take place in Islington Square, and a meeting was arranged by the appellant to be held the same evening in front of St. George's Hall, which is a place in the city of Liverpool to which the public have access, and notice of his intention to hold that meeting was given by the appellant to the Liverpool police about 6.30 the same evening, and a large crowd, numbering about 6000 people, assembled in front of St. George's Hall. When the appellant appeared on the scene a number of his opponents, who were waiting for him at the north end of the steps leading to St. George's Hall, made a rush for him, and a free fight ensued between his supporters and his opponents. A number of police, who had been taken there in anticipation of a breach of the peace occurring, were all called up to protect him and take him away; and this was done, and he was escorted from St. George's Hall to the Central Station. On the way to the station the majority of the crowd followed, and there were many "ugly rushes" by them to get at the appellant, and many of the police were assaulted and knocked down in the streets. The appellant did not himself commit any breach of the peace at

the meeting; nor did he threaten to do so, or incite any other person or persons to do so.

The appellant was the same person whose meetings and addresses in connection with the "crusade" have on several other occasions caused the police of the city of Liverpool to make special provisions to prevent a disturbance in the public streets of the city.

The appellant stated in Court, on the hearing of a summons heard before the present information and complaint, that he intended to hold similar meetings to those above mentioned in future.

The respondent deposed that, if such meetings were held, he had no doubt whatever they would lead to a breach of the peace.

The magistrate ordered the appellant to enter into a recognizance in the sum of 100*l.*, with two sureties in 50*l.* each, to keep the peace and be of good behaviour during the twelve months then next ensuing, and in default to be imprisoned for two months.

The questions for the opinion of the Court were, whether the information was void as a matter of law, and whether, on the facts stated in the case, the magistrate had jurisdiction and was entitled to make the order against the appellant.

F. E. Smith, for the appellant. The magistrate's decision was wrong. He had no jurisdiction to bind over the appellant to keep the peace, because there was no evidence that the appellant had committed a breach of the peace. Nor could the magistrate bind him over to be of good behaviour under 34 Edw. 3, c. 1 (1), because, in order to give jurisdiction to do that, the person must be justly suspected that he intends to break the peace: 4 Coke's Institutes, p. 181; *Haylock* v. *Sparke* (2), per Lord Campbell C.J. Here there was no sufficient evidence to found such a suspicion, and therefore no power to

(1) 34 Edw. 3, c. 1, authorizes justices of the peace "to take, of all them that be not of good fame, where they shall be found, sufficient surety and mainprize of their good behaviour towards the King and his people."

(2) (1853) 22 L. J. (M.C.) 67, at pp. 71, 72.

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bind over: *Reg.* v. *Justices of Londonderry.* (1) The appellant's conduct was lawful, and he cannot be bound over because the conduct of others was, or was likely to be, unlawful: *Beatty* v. *Gilbanks.* (2) Assuming that his conduct and language did tend to provoke a breach of the peace by others, and caused offence to persons of a different religion, there is, unless he has acted illegally, no power to restrain him. Proceedings might, no doubt, be taken against him under local Acts and by-laws, or he might be indicted for a nuisance, if the crowds which assembled at his meetings caused danger or obstruction to the traffic. The cases decided by the Courts in Ireland, *Reg.* v. *Justices of Londonderry* (1) and *O'Kelly* v. *Harvey* (3), are really in conflict with *Beatty* v. *Gilbanks* (2): see Dicey on the Constitution, 5th ed. Pt. II. c. 7, p. 263; Appendix, note 5, p. 444. They state the jurisdiction too widely. The information is bad. It discloses no offence, nor any circumstances to justify binding over the appellant to keep the peace or be of good behaviour.

Pickford, K.C. (*Maxwell* with him), for the respondent. There was ample evidence to justify the magistrate in binding the appellant over to keep the peace. The passage from Blackstone (book 4, c. 18), cited by May C.J. in *Reg.* v. *Justices of Cork* (4), applies here: "Preventive justice consists in obliging those persons whom there is probable ground to suspect of future misbehaviour to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behaviour." Here the appellant was threatening to repeat what he had done before, and that in itself was unlawful. He had committed three distinct offences: (*a*) the holding of meetings in public thoroughfares and places, which is illegal: *Haylock* v. *Sparke* (5), and see Charles J.'s direction to the jury in *Reg.* v. *Cunningham Graham and Burns* (6); (*b*) he had used "threatening, abusive, and insulting words

(1) (1891) 28 L. R. Ir. 440.
(2) (1882) 9 Q. B. D. 308.
(3) (1882) 14 L. R. Ir. 105.
(4) (1882) 15 Cox C. C. 78, at p. 83.
(5) 22 L. J. (M.C.) 67; 1 E. & B. 471.
(6) (1888) 16 Cox C. C. 420.

and behaviour " in the streets " whereby a breach of the peace might be occasioned " contrary to the provisions of the local Act in force in Liverpool—the Liverpool Improvement Act, 1842 (5 & 6 Vict. c. cvi. s. 149); and (*c*) he had used language inciting to a breach of the peace by recommending his supporters to arm themselves so as to form a body-guard for himself. The natural consequence of the insulting expressions which he used towards the Roman Catholics was that breaches of the peace would be committed, and he must be taken to have intended that consequence. In one of the instances stated in the case, after undertaking not to hold a meeting at a particular place he held one on the same day at a place only a quarter of a mile away. As to the objection taken to the information, no formal complaint is necessary where the party appears before the justices: *Ex parte Davis* (1); *Reg* v. *Hughes* (2); but the information does state sufficient grounds for binding the appellant over to keep the peace.

F. E. Smith, in reply. No charge was made before the magistrate that the appellant had committed an unlawful act by holding meetings in the public streets. The holding of a meeting in a public street is not unlawful unless it be proved that a danger or obstruction has taken place, and there was no evidence or allegation that any danger or serious or permanent obstruction had taken place. There was no more evidence of obstruction than in *Beatty* v. *Gilbanks*. (3) No proceedings under the local Act were taken against the appellant. The Act was not even referred to before the magistrate. It only aims at preventing the use of bad language in the streets, which might cause street brawls. A man is not in law bound to assume that the natural consequence of a lawful act which he does will be the commission of unlawful acts by others. The use of language which is merely gross and insulting constitutes no offence. The law is correctly stated in Stone's Justices' Manual, 33rd ed. p. 924, thus: " There is, therefore, really no law by which the offender can be summarily punished

(1) (1871) 24 L. T. 547. (2) (1879) 4 Q. B. D. 614.
(3) 9 Q. B. D. 308.

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for mere insulting and gross language unaccompanied by threats."

LORD ALVERSTONE C.J. This is a case stated by way of appeal from an order made by the stipendiary magistrate of Liverpool binding over the appellant "to be of good behaviour." The recognizance also bound him over "to keep the peace"; but the actual form of it is not material because it contained the words "to be of good behaviour." The case has been extremely well argued. I am of opinion that the magistrate was perfectly justified in putting the appellant under recognizances. It is not necessary to go at great length into the various authorities which were cited to us; I am not able to find in those authorities any statement of a rule of law which is to be applied in all such cases as this. The difficulty arises from attempts to apply the law to particular states of circumstances, for it is obvious that different people may express different opinions as to what ought to have been the application of the law under particular circumstances. For instance, our attention was called to the opinion of a very learned lawyer and writer, Mr. Dicey, with respect to *Beatty* v. *Gilbanks* (1), and his opinion, as I understood the passage when read, was that the view taken by the Irish Courts is in conflict with that taken by Field J. and Cave J. in that case. But I think that, when *Beatty* v. *Gilbanks* (1) is closely examined, it lays down no law inconsistent with anything stated by the judges in the Irish cases. For this purpose it is sufficient to cite the following passages. In *Beatty* v. *Gilbanks* (1) Field J. said, stating, I think, the law with absolute accuracy: "Now I entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention." O'Brien C.J. in *Reg.* v. *Justices of Londonderry* (2) said: "No

(1) 9 Q. B. D. 308. (2) 28 L. R. Ir. 440, at p. 447.

act on the part of any person was proved to shew that it was reasonably probable that the conduct of the defendants would, on the day in question, have provoked a breach of the peace." It is, in my opinion, important to emphasize that enunciation of the necessary test, because it has been pressed upon us by the appellant's counsel that if the appellant did not intend to act unlawfully himself, or to induce other persons to act unlawfully, the fact that his words might have led other people so to act would not be sufficient.

In *Reg.* v. *Justices of Cork* (1) May C.J., after quoting the passage from Blackstone which was read to us during the argument, proceeded: "This requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. This caution is such as is intended merely for prevention without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen, and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground for apprehension." Again, in the second case of *Reg.* v. *Justices of Cork* (2), reported in the same volume, Fitzgerald J., after referring to the authorities, said (3): "Without citing further authority we may assume that where it shall be made reasonably to appear to a justice of the peace that a person has incited others by acts or language to a violation of law and of right, and that there is reasonable ground to believe that the delinquent is likely to persevere in that course, such justice has authority by law, in the execution of preventive justice, to provide for the public security by requiring the individual to give securities for good behaviour, and in default commit him to prison." I have referred to those cases, not for the purpose of endeavouring to deduce from them any new rule of law, but for the purpose of pointing out that, in a number of cases and before different judges, what I may call the essential condition has been stated, substantially in the same way though in different language, that there must be an

(1) 15 Cox C. C. 78, at p. 84. (2) 15 Cox C. C. 149.
(3) 15 Cox C. C. at p. 155.

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Lord Alverstone C.J.

act of the defendant, the natural consequence of which, if his act be not unlawful in itself, would be to produce an unlawful act by other persons. This case might really be put higher, but I have so far dealt with the matter assuming the facts in favour of the argument of the counsel for the appellant. I think that the local Act, to which we were referred, has a very important bearing on this case. It provides that any person who uses any threatening, or abusive, or insulting words or behaviour with intent to provoke a breach of the peace (which is not this case), or whereby a breach of the peace may be occasioned, may be summoned before the local magistrates and fined. It was contended for the appellant that the Act was only intended to prevent persons from using bad language in the streets of Liverpool with impunity. Though that may have been one of the evils which the Act aimed at, I do not think that its scope was so limited. Here we have distinct findings of facts that the appellant held a number of meetings in the public streets; that the highways were blocked by crowds numbering thousands of persons; that very serious contests and breaches of the peace had arisen, and that the appellant himself used, with respect to a large body of persons of a different religion, language which the magistrate has found to be of a most insulting character, and that the appellant challenged any one of them to get up and deny his statements. Magistrates are only doing their duty when they have regard to and make themselves acquainted with the character of the population amongst whom they have to administer justice; and, in considering the natural consequence of a man's acts who has used insulting language in the public streets towards persons of a particular religion, the magistrates are bound to take into consideration the fact that there is a large body of those persons in the town. The appellant also was proved to have stated, with respect to a meeting he intended to hold, that he had received a letter informing him that the Catholics were going to bring sticks, and he told his supporters that the police had refused to give him protection, and he said that he looked to them for protection. On these facts I think no one could reasonably doubt that the police

and the magistrate were right in thinking that his language and conduct went very far indeed towards inciting people to commit, or was, at any rate, language and behaviour likely to occasion, a breach of the peace. It may be true that, if this case were to be considered with reference only to any particular one of the threats or illegalities which it is suggested the appellant has committed, further evidence would have been necessary; but, in my opinion, there was abundant evidence to shew that in the public streets he had used language which had caused an obstruction, which was abusive, which did tend to bring about a breach of the peace, and that he threatened and intended to do similar acts in another place. The fact that he had promised not to hold a meeting at one place, but had held it within a quarter of a mile of that place on the same day, shews, at any rate, that the magistrate was justified in taking precautions to prevent a repetition of his previous conduct.

Further, I think that the information was sufficient to justify the magistrate in hearing the evidence, and that any omission in the language of the information, although it does allege meetings on the highway and fear of a breach of the peace, was amply cured by the evidence which was given. The magistrate heard the information; the appellant was represented by a solicitor, and elected to give no evidence. Instead of being punished, he was properly bound over to keep the peace. I am of opinion that the magistrate acted within his jurisdiction, and quite rightly; that the points of law raised on behalf of the appellant fail, and that our judgment should be for the respondent.

DARLING J. I am of the same opinion. I think it necessary to summarize shortly the facts which were proved before the magistrate. To begin with, we have the appellant's own description of himself. He calls himself a "crusader," who is going to preach a Protestant crusade. In order to do this he supplied himself with a crucifix, which he waved about, and round his neck were hung beads—obviously designed to represent the rosaries used by Roman Catholics. Got up in this

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Darling J.

way, he admittedly made use of expressions most insulting to the faith of the Roman Catholic population amongst whom he went. There had been disturbances and riots caused by this conduct of his before, and the magistrate has found that the language of the appellant was provocative, and that it was likely to occur again. Large crowds had assembled in the streets, and a serious riot was only prevented by the interference of the police. Now, what was the natural consequence of the appellant's acts? It was what has happened over and over again, what has given rise to all the cases which were cited to us, and what must be the inevitable consequence if persons, whether Protestants or Catholics, are to be allowed to outrage one another's religion as the appellant outraged the religion of the Roman Catholics of Liverpool. The kind of person which the evidence here shews the appellant to be I can best describe in the language of Butler. He is one of

> ". . . . that stubborn crew
> Of errant saints, whom all men grant
> To be the true Church Militant;
> * * * *
> A sect, whose chief devotion lies
> In odd perverse antipathies."—*Hudibras*, Pt. I.

In my view, the natural consequence of those people's conduct has been to create the disturbances and riots which have so often given rise to this sort of case. Counsel for the appellant contended that the natural consequence must be taken to be the legal acts which are a consequence. I do not think so. The natural consequence of such conduct is illegality. I think that the natural consequence of this "crusader's" eloquence has been to produce illegal acts, and that from his acts and conduct circumstances have arisen which justified the magistrate in binding him over to keep the peace and be of good behaviour. In the judgment of O'Brien C.J. in *Reg.* v. *Justices of Londonderry* (1) there is this passage: "Now I wish to make the ground of my judgment clear, and carefully to guard against being misunderstood. I am perfectly satisfied that the magistrates did not make the order which is impugned by reason of

(1) 28 L. R. Ir. 440, at p. 447.

there having been, or there being likely to be, any obstruction of the highway, and that the true view of what took place is that the defendants were bound over in respect of an apprehended breach of the peace; and, in my opinion, there was no evidence to warrant that apprehension." It is clear that, if there had been evidence to warrant that apprehension, the Chief Justice would have held the magistrates' decision in that case to be right. It is said that *Beatty* v. *Gilbanks* (1) is in conflict with that decision. I am not sure that it is. I am inclined to think that, having regard to the passage which my Lord read from Field J.'s judgment in *Beatty* v. *Gilbanks* (1), the whole question is one of fact and evidence. But I do not hesitate to say that, if there be a conflict between these two cases, I prefer the law as it is laid down in *Reg.* v. *Justices of Londonderry*. (2) If that be a right statement of the law, as I think it is, the magistrate was perfectly justified in coming to the conclusion he did come to in this case, even without taking into consideration the question of the local Act of Parliament to which we were referred.

For these reasons I am of opinion that the magistrate's order was right.

CHANNELL J. I am of the same opinion. I agree with the proposition for which counsel for the appellant contended—namely, that the law does not as a rule regard an illegal act as being the natural consequence of a temptation which may be held out to commit it. For instance, a person who exposes his goods outside his shop is often said to tempt people to steal them, but it cannot be said that that is the natural consequence of what he does. Again, the House of Lords has recently held that, where a blank space is left in a cheque which enables a person to increase the amount by adding figures, it is not the natural consequence that somebody should be led to commit forgery by writing figures into the cheque. The proposition is correct and really familiar; but I think the cases with respect to apprehended breaches of the peace shew that the law does regard the infirmity of human temper to the

(1) 9 Q. B. D. 308. (2) 28 L. R. Ir. 440.

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extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct. Possibly this is an exception to the rule which the appellant's counsel pointed out to us; but I think it is quite clearly made out upon the cases which have been cited to us.

I therefore think that the decision of the magistrate was right.

Judgment for the respondent.

Solicitors for appellant: *Field, Roscoe & Co., for Miller, Peel, Hughes, Rutherford & Co., Liverpool.*

Solicitors for respondent: *F. Venn & Co., for Pickmere, Liverpool.*

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THE KING *v.* THE JUSTICES OF ESSEX.

Poor-rate—Appeal—Assessment Committee—Failure to obtain Relief on Objection to Valuation List—Appeal against Subsequent Rates—Condition Precedent—Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict.* c. 39), s. 1.

Where a person rated to the relief of the poor in a country parish has objected, under s. 1 of the Union Assessment Committee Amendment Act, 1864, before the assessment committee of the union to his assessment in the valuation list in force for the parish; and, having failed to obtain the relief he asks for, has appealed to sessions against the then current poor-rate made in conformity with the valuation list, it is a condition precedent to his right to appeal against a subsequent rate made in conformity with the same list that he should again have given the notice of his objection to the valuation list required by s. 1, and have failed to obtain relief from the assessment committee.

Reg. v. *Great Western Ry. Co.*, (1869) L. R. 4 Q. B. 323, followed.

Reg. v. *Justices of Denbighshire*, (1885) 15 Q. B. D. 451, distinguished.

RULE, calling upon the justices for the county of Essex to shew cause why a writ of mandamus should not issue commanding them to enter continuances and hear and determine the merits of an appeal against a rate, made on May 4, 1901, for the relief of the poor of the parish of Prittlewell in the same county.

The rule was obtained upon an affidavit, made by one of the

appellants, stating the following facts, which were not disputed:—

The appellants were rated in respect of premises occupied by them in the parish of Prittlewell. On June 23, 1900, being dissatisfied with the assessment of those premises in the valuation list for that parish, they gave notice of objection thereto to the assessment committee of the Rochford Union, and the objection was heard on September 5, 1900, when the committee reduced the assessment, but not to the extent claimed by the appellants. A poor-rate had been made for the parish on May 8, 1900; and, being still dissatisfied, the appellants appealed to the justices in special sessions against that rate. On November 5, 1900, the appeal was heard, and the justices at special sessions amended the rate by reducing the assessment, but determined not to reduce it to the extent claimed by the appellants. Another poor-rate was made on October 26, 1900, and was the current rate at the time when the appeal to special sessions was heard and determined, and the next poor-rate made thereafter was made on May 4, 1901. On June 12, 1901, the appellants gave notice of appeal to quarter sessions against the rate made on May 4, 1901. No alteration in the appellants' premises, or in the value thereof, had taken place since the appellants objected to the assessment thereof in the valuation list. The grounds of appeal stated in the notice were—(1.) that the appellants' premises were assessed at sums exceeding the true gross estimated rental and rateable value thereof; (2.) that certain premises specified in the notice were assessed unfairly and incorrectly and at sums less than the true gross estimated rental and rateable value thereof; and (3.) that certain rateable hereditaments, also specified in the notice, were omitted from the rate, and ought to be inserted therein and duly assessed at their respective true gross estimated rentals and rateable values.

On the hearing of the appeal it was objected on behalf of the respondents—first, that as regarded the first ground of appeal the appellants were concluded by the finding of the special sessions on November 5, 1900, that finding not having been appealed against, and being therefore binding and conclusive under s. 67 of 6 & 7 Will. 4, c. 96; secondly, that as

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regarded the same ground of appeal, the appellants were not entitled to appeal to quarter sessions against the rate without again objecting before the assessment committee to the valuation list on which the rate was based, the appellants not having so objected since they made the objection on June 23, 1900; thirdly, that as regarded the second and third grounds of appeal the appellants could not be heard because they had not at any time objected to the valuation list on any of those grounds.

The Court of quarter sessions allowed those objections to the appeal, and dismissed it, refusing to hear it upon the merits.

This rule was thereupon obtained at the instance of the appellants.

H. Avory, K.C. (*J. C. Earle* with him), for the justices, shewed cause against the rule. The justices at quarter sessions were right in refusing to hear the case on the merits. The first objection taken to the appeal at quarter sessions cannot be supported. It must be admitted that the decision of the special sessions is only conclusive with respect to the particular rate appealed against before them.

The second objection is good. It was a condition precedent to the appellants' right of appeal to quarter sessions against the May rate, 1901, that they should have given notice to the assessment committee and gone before them again, and tried to get their assessment in the valuation list reduced. *Reg.* v. *Great Western Ry. Co.* (1) is a distinct authority that, where a person dissatisfied with his assessment in the valuation list has been before the assessment committee, and, having failed to obtain the relief he seeks, has appealed against the next rate made, he must, if he desires to appeal against a subsequent rate, give the notice to the assessment committee prescribed by s. 1 of the Union Assessment Committee Amendment Act, 1864. (2) The cases decided since that decision are all dis-

(1) L. R. 4 Q. B. 323.

(2) 27 & 28 Vict. c. 39, s. 1: "Before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter

tinguishable, and are all consistent with the proposition it establishes. They are *Reg.* v. *Justices of Derbyshire* (1), *Reg.* v. *Justices of Wiltshire* (2), and *Reg.* v. *Justices of Denbighshire.* (3)

Macaskie, K.C., and *Alexander Glen*, for the appellants at quarter sessions, supported the rule. The second objection to the appeal was bad, and the justices ought to have heard the appeal on the merits. The appellants have already given notice to and been before the assessment committee; whether or not that is sufficient to enable them to appeal against the May rate depends upon the authorities. The decision in *Reg.* v. *Great Western Ry. Co.* (4) has never been viewed with approval, and it was wrong. The later cases are inconsistent with it, and especially *Reg.* v. *Justices of Denbighshire* (3), which is conclusive in favour of the contention for the appellants. That case decides that where a person has been before the assessment committee once and failed to obtain relief, he need not go again for the purpose of hearing again the decision given against him. Mathew J.'s judgment (5) lays down the proper rule. Sect. 1 of the Act of 1864 only refers to one objection before the assessment committee. *Reg.* v. *Justices of Denbighshire* (3) was approved in *Reg.* v. *Justices of Essex* (6)

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sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided, that after the first day of August next no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

(1) (1871) 25 L. T. 43.

(2) (1879) 4 Q. B. D. 326.

(3) 15 Q. B. D. 451.

The arguments of counsel, and the cases cited by them, with respect to the third objection to the appeal at quarter sessions, are omitted, as the Divisional Court gave no judgment upon that point.

(4) L. R. 4 Q. B. 323.

(5) 15 Q. B. D. at p. 456.

(6) [1895] 1 Q. B. 38, at p. 42.

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by Lopes L.J. At any rate, where, as is the case here, the value of the premises has not altered since the appellant went before the assessment committee, there is no need to give them a second notice and go before them again.

[CHANNELL J. That can hardly be so. The Court of quarter sessions have nothing to do with the question whether or not the value of the premises has altered. They cannot entertain it. They have only to decide whether, on the grounds stated in the notice of appeal, the appellants' premises are over-assessed when the appeal comes before them.]

LORD ALVERSTONE C.J. In this case three grounds of objection to the appeal were taken before the court of quarter sessions. The first was that there had been an appeal to special sessions against a former rate, and that the decision of the special sessions was binding and final in the sense of determining the value for the purpose of that valuation list, assuming that the rates appealed were made in accordance with it. That objection is not now, and could not be, insisted upon, because it is quite clear that subsequent rates could be appealed against. The second ground was that the appellants could not appeal to quarter sessions against the rate in question unless they had given a second notice to the assessment committee that they objected to the valuation list, and had gone before the assessment committee again. The third ground was that their notice of appeal to quarter sessions included, as grounds of appeal, the undervaluation in the rate of other rateable hereditaments in the parish, and the omission from the rate of rateable hereditaments in the parish, and it was admitted that with respect to those matters no notice of objection to the valuation list had been given by the appellants to the assessment committee at all. I am of opinion that the second ground of objection is a good one. When the authorities are carefully considered, I think that there is no real discrepancy between them. In substance they come to this, and no more —that under s. 1 of the Union Assessment Committee Amendment Act, 1864, if a person has been before the assessment committee and has failed to obtain the relief to which he

thinks he is entitled in respect of the matter which he is making the subject of an appeal, he need not go before the committee again; but, unless that be the real state of things, it is a condition precedent to his right to appeal that he should have gone before the assessment committee and failed to obtain from them the relief he seeks. *Reg.* v. *Great Western Ry. Co.* (1) is a distinct authority for the proposition that, where a second rate is made in conformity with the valuation list, the person assessed having appealed against the first rate after having objected before the assessment committee to the valuation list, he cannot appeal against the second rate unless he has given a second notice to the assessment committee and has gone before them again. It is said that the decision in *Reg.* v. *Great Western Ry. Co.* (1) has been doubted, that it is no longer to be regarded as law, and that it is inconsistent with *Reg.* v. *Justices of Denbighshire.* (2) Of course, if that were the true view, we should be bound to give effect to it; but I do not think that any of the criticism which has been applied to *Reg.* v. *Great Western Ry. Co.* (1) in subsequent cases touches the substance of that decision, nor that any of the cases meant to overrule it. It is true that in *Reg.* v. *Justices of Wiltshire* (3) Cockburn C.J. said that his confidence was somewhat shaken in the correctness of the decision in *Reg.* v. *Great Western Ry. Co.* (1); but in *Reg.* v. *Justices of Wiltshire* (3), and in the other cases which have followed *Reg.* v. *Great Western Ry. Co.* (1), the question was entirely different. In the *Wiltshire Case* (3) it was decided that you need not go before the assessment committee twice in respect of the same rate—that is to say, that if you have been before the assessment committee and objected to the valuation list before any rate is made, and when a rate is made on that valuation list you determine to appeal, you need not go before the assessment committee a second time. The case of *Reg.* v. *Justices of Derbyshire* (4) went a little further, and decided that where a rate is made and you have gone before the assessment committee and have got a certain amount of relief, but you are not satisfied, and intend

(1) L. R. 4 Q. B. 323.
(2) 15 Q. B. D. 451.
(3) 4 Q. B. D. 326.
(4) 25 L. T. 43.

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to appeal against the rate which has been altered in conformity with the assessment committee's decision, you need not go again, because you have already failed to obtain the relief you asked for.

Lord Alverstone C.J.

In *Reg.* v. *Justices of Denbighshire* (1) the decision was, I think, this, and this only—that where a rate is made which is the first effective rate after you have gone before the assessment committee and failed to obtain the relief you asked for, then you can appeal against that rate without going a second time before them. It was only a development, under slightly different circumstances, of *Reg.* v. *Justices of Wiltshire* (2) and *Reg.* v. *Justices of Derbyshire.* (3) The difference in dates, and the incident that a rate had been made in April, and paid, had nothing to do with the decision in the Denbighshire case. The question was whether it was necessary, having been before the assessment committee in September, to go before them a second time with regard to the rate made in November. Where there is a second appeal against another rate, *Reg.* v. *Great Western Ry. Co.* (4) applies, and the conditions of the statute must be fulfilled by giving another notice of objection to the valuation list to the assessment committee. That consequence seems to me most reasonable. Valuation lists in the country, unlike those in the metropolis, remain in force for years until some one is minded to have a revaluation of property in the parish. Circumstances may alter. A man goes before the assessment committee immediately after a rate is made in conformity with the valuation list, and he either gets, or he does not get, relief. If he does not get relief, he may appeal or not appeal against the rate. Years go on; the value of property in the parish alters, and he thinks that he ought to be rated at a lower rate. It seems hardly to be disputed that it would be an unreasonable thing if, under those circumstances, he was not bound, before he appealed, to go before the assessment committee again, especially when one remembers that the assessment committee may be made respondents and have to pay costs; but it was contended that he need not go before

(1) 15 Q. B. D. 451.
(2) 4 Q. B. D. 326.
(3) 25 L. T. 43.
(4) L. R. 4 Q. B. 323.

the assessment committee again where the circumstances have not altered. But, as my brother Channell pointed out during the argument, that cannot be so. The quarter sessions cannot enter into the question whether or not the circumstances have altered. The notice of appeal only states that the appellant is overrated, and he brings before the Court his grounds for saying that he is. I think the case before us, where there has been a subsequent rate and a second appeal, is a stronger case for saying that the conditions of s. 1 of the Act of 1864 must be complied with. Here the proceedings before the assessment committee in respect of the rate made in May, 1900, were all over. There was a rate made in October which possibly might have been appealed against, and that rate was paid. In May, 1901, another rate was made, and the appellants were minded to raise the question of their assessment again. It was not the same rate as the rate in respect of which they had been before the assessment committee; a period of twelve months had elapsed. In my opinion, as poor-rates are made from year to year, they had a right to appeal again if they thought fit; but, having that right, they must comply with the provisions of s. 1. I express no opinion upon the third ground, upon which objection is taken to the appeal to quarter sessions. It is not necessary to decide the point in this case. It raises a difficult question which one day will have to be decided. The authorities seem to be in conflict with respect to it. Upon the second ground of objection to the appeal, I am of opinion that this rule should be discharged.

DARLING and CHANNELL JJ. were of the same opinion.

Rule discharged.

Solicitors for prosecutors: *Sismey & Cook, for B. & F. Tolhurst & Cox, Southend-on-Sea.*

Solicitors for respondents: *Kingsford, Dorman & Co., for W. & F. Gregson, Southend-on-Sea.*

W. A.

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Nov. 22;
Dec. 16.

MAYOR, &c., OF WAKEFIELD, APPELLANTS *v.* COOKE AND OTHERS, RESPONDENTS.

Local Government—Estoppel—Res judicata—Justices, Summary Proceedings before—Decision that Street is a Highway—Wakefield Corporation Act, 1887 (50 & 51 *Vict. c. lxxi.*), *ss.* 29, 30, 31—*Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.

In proceedings taken in 1898 under ss. 29, 30, and 31 of the Wakefield Corporation Act, 1887 (which are identical with ss. 6, 7, and 8 of the Private Streets Works Act, 1892), for paving, &c., part of a certain street, the magistrates decided on an objection of the frontagers that the street was a highway repairable by the inhabitants at large. In 1900 fresh proceedings were taken under the same sections with the same object, and the same objection was taken by the frontagers:—

Held, that the matter was not res judicata, and that the previous decision was no bar to the proceedings.

SPECIAL CASE stated by justices.

At a meeting of the general works committee of the corporation of Wakefield held on November 26, 1900, the following resolution was passed: "That in pursuance of s. 29 of the Wakefield Corporation Act, 1887, the corporation do the following private street works in the private street known as Sludge Lane, in this city, extending from Eastmoor Road for a distance of 350 yards, namely, sewer, level, metal, flag, kerb, channel, and make good such street; and, further, that the city surveyor be directed to prepare as respects such street, and in accordance with the provisions of the said Act: (*a*) a specification of the private street works above referred to with plans and sections; (*b*) an estimate of the probable expenses of the works; and (*c*) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the said Act."

This resolution was approved at a meeting of the council on December 11, 1900.

On January 14, 1901, the city surveyor laid before a meeting of the general works committee the specification, plans, and sections, estimate and provisional apportionment which he had been directed to prepare, and the committee resolved "that it

be recommended to the council to pass a resolution approving of such specification, plans and sections, estimate and provisional apportionment, and to order that such resolution be published, and copies thereof served in the manner required by the Wakefield Corporation Act, 1887."

On February 12, 1901, the corporation passed the following resolution: "That the specification of the private street works required to be carried out in that portion of the private street known as Sludge Lane, in this city, extending from the Eastmoor Road for a distance of 350 yards, together with the plans and sections of such works, the estimate of the probable expenses, and the provisional apportionment of the estimated expenses among the premises liable to be charged therewith, which had been prepared by the city surveyor in accordance with the instructions given to him, now laid before this meeting, be approved as required by the Wakefield Corporation Act, 1887; and, further, that this resolution be published, and copies served in the manner required by the said Act."

The said resolution was duly published as required by the said Act, and copies of such resolution were duly served on the owners of the premises shewn as liable to be charged in the said provisional apportionment.

Alfred Green, George Stubley, Elizabeth Cradock, Robert Cockell, J. B. Cooke, G. T. Kenworthy, C. B. L. Fernandes, and G. F. Firth, the owners of premises shewn in the said provisional apportionment as liable to be charged with part of the expenses of the works to be carried out in the said street, by separate notices served upon the corporation on March 16, 1901, objected to the proposals of the corporation on the grounds (*a*) that Sludge Lane is not and does not form part of a street within the meaning of the said Act; and (*b*) that Sludge Lane is a highway repairable by the inhabitants of the city of Wakefield at large.

The county council of the West Riding of Yorkshire, the owners of certain other premises shewn in the provisional apportionment, by notice served on the corporation on the same day, objected to the proposals of the corporation on similar grounds, with the following additional ground, "that

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the said alleged street is a highway repairable by the inhabitants at large, and was so found to be by the justices of the city of Wakefield at a court of summary jurisdiction held at Wakefield on January 6, 1898."

The month during which owners of premises shewn in the provisional apportionment as liable to be charged with any part of the expenses of executing the works could by written notice object to the proposals of the corporation expired on March 23, 1901.

Messrs. Claude Leatham & Co., as solicitors and agents for the acting executors and trustees of the will of Thomas Nichols, one of the owners shewn in the provisional apportionment as liable to be charged with some part of the expenses of the works proposed to be carried out in Sludge Lane, by notice served on the corporation on April 20, 1901, objected to the proposals of the corporation on similar grounds.

On July 10, 1901, the corporation, in pursuance of s. 31 of the Act, applied to a court of summary jurisdiction in and for the city of Wakefield to appoint a time and place for determining the matter of all the said objections, and July 25, 1901, at the town hall at Wakefield, was appointed for the purpose. At the hearing it was admitted that all the resolutions, plans, and notices had been passed, prepared, published, and given by the corporation in accordance with the provisions of the Act; but the objectors objected that the matter was res judicata, and a certified copy of an order of three justices of the peace of the city of Wakefield dated January 6, 1898, which had not been appealed against and remained in full force and effect, was put in.

The order was as follows:—

"In the city of Wakefield. Before the court of summary jurisdiction sitting at the town hall in the said city, January 6, 1898.

"Whereas the mayor, aldermen, and citizens of the city of Wakefield, in exercise of the powers vested in them by virtue of the Wakefield Corporation Act, 1887, at a meeting duly held and convened on March 9, 1897, passed a resolution of which the following is a copy: 'That the specification of the private

street works required to be carried out in the private street commonly known as Sludge Lane, in this city, together with the plans and sections of such works, the estimate of the probable expenses of such works, and the provisional apportionment of the estimated expenses among the premises liable to be charged therewith, which had been prepared by the city surveyor in accordance with instructions given to him now laid before this meeting, be approved as required by the Wakefield Corporation Act, 1887; and, further, that this resolution be published and copies served in the manner required by the said Act'; and whereas as required by the said Act the said resolution was duly published, and copies of such resolution were duly served on the owners of the premises shewn as liable to be charged in the said provisional apportionment, and whereas in accordance with the provisions of the said Act the following owners, namely, Frederick Simpson, J. B. Cooke, George Stubley, Thomas Nichols, Robert Cockell, Alfred Green, G. F. Firth, the county council of the West Riding of Yorkshire, and the executors of the late Benjamin Watson, objected to the proposals of the corporation on (inter alia) the following ground, 'That Sludge Lane is a highway repairable by the inhabitants of the city of Wakefield at large'; and whereas as further required by the said Act the corporation . . . . made application to two of Her Majesty's justices of the peace acting in and for the city of Wakefield . . . . to appoint a time and place for hearing the matter of the said objections . . . . and whereas . . . . two of Her Majesty's justices of the peace acting in and for the said city . . . . did appoint . . . . Monday, December 20, 1897 . . . . for hearing and determining the matter of the said objections, from which day the hearing and determining the matter of the said objections as aforesaid hath been adjourned to this day, and whereas we, the undersigned, sitting as a court of summary jurisdiction in pursuance of s. 31 of the said Wakefield Corporation Act, 1887, to hear and determine the matter of all such objections as aforesaid, do hereby determine that the following objection, namely, that Sludge Lane is a highway repairable by the inhabitants of the city of Wakefield at large, made by or on

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behalf of the said Frederick Simpson, J. B. Cooke, George Stubley, Thomas Nichols, Robert Cockell, Alfred Green, G. F. Firth, the county council of the West Riding of Yorkshire, and the executors of the late Benjamin Watson, is a good and valid objection." Given under the hands and seals of three justices of the peace for the city of Wakefield.

It was admitted as a fact by all parties that the resolutions, plans, notices, and objections referred to in the application of July 10, 1901, related not only to so much of Sludge Lane as was the subject-matter of the proceedings of January 6, 1898, but also to an additional length of eighty yards in a straight line and continuous therewith.

The same objectors were present or represented at the hearing on July 25, 1901, as were present or represented at the hearing on January 6, 1898, except Frederick Simpson and Thomas Nichols. Elizabeth Cradock, who objected on July 25, 1901, was not an objector on January 6, 1898, although then owning property the subject-matter of the proceedings. The property belonging to Frederick Simpson on January 6, 1898, was included in the proceedings of July 25, 1901, as belonging to George Stubley, the said G. Stubley having purchased the property from Frederick Simpson in the meantime. Thomas Nichols had died between January 6, 1898, and July 25, 1901, and his executors, as owners of the property included in the proceedings of January 6, 1898, were represented at the hearing on July 25, 1901. The property belonging on January 6, 1898, to the executors of Benjamin Watson had been acquired from them by G. T. Kenworthy and C. B. L. Fernandes, and was included in the proceedings of July 25, 1901, at which they appeared. It was admitted that C. B. L. Fernandes was also present at the hearing on January 6, 1898, and that he expressed his willingness to be bound by the proceedings on that occasion.

It was contended on behalf of the objectors that as the court of summary jurisdiction had on January 6, 1898, found as a fact that Sludge Lane was a highway repairable by the inhabitants at large and had so determined, and that as the subject-matter, namely, as to whether Sludge Lane was a highway

repairable by the inhabitants at large, and the parties, namely, the corporation on the one hand and the owners of the property abutting on the road in question on the other, were the same, the matter was res judicata, and the corporation were estopped in the present proceedings by the determination of the Court on January 6, 1898.

It was contended for the corporation, on the authority of *Reg.* v. *Hutchings* (1), that the Court on January 6, 1898, had no power to try the question whether Sludge Lane was a highway repairable by the inhabitants at large, and that the subject-matter was not the same by reason of the corporation having taken a greater length of road than on the previous occasion, and that the parties were not the same, since some of the property had changed hands since January 6, 1898, and one owner objected now who did not object then. The corporation further urged that since January 6, 1898, they had discovered and intended to adduce in evidence certain additional facts relevant to the objection that Sludge Lane was a highway repairable by the inhabitants at large. (2)

(1) (1881) 6 Q. B. D. 300.

(2) By the Wakefield Corporation Act, 1887 (50 & 51 Vict. c. lxxi.), s. 29, "(1.) Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, kerbed, channelled, made good, and lighted to the satisfaction of the corporation, the corporation may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works), that is to say, to sewer, level, pave, metal, flag, kerb, channel, or make good, or to provide proper means for lighting such street or part of a street, and the expenses incurred by the corporation in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street.

"(2.) The surveyor shall prepare, as respects each street or part of a street, (*a*) a specification of the private street works referred to in the resolution, with plans and sections (if applicable); (*b*) an estimate of the probable expenses of the works; (*c*) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act. Such specifications, plans, sections, estimates and provisional apportionments shall comprise the particulars prescribed in Part I. of the 2nd schedule to this Act, and shall be submitted to the corporation, who may by resolution approve the same respectively with or without modification or addition as they think fit."

"(3.) The resolution approving the specifications, plans and sections (if

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The justices decided that the matter was res judicata, and declined to hear any evidence or go into the merits of the objection, but stated this case for the opinion of the Court.

Macmorran, K.C. (*Senior* with him), for the appellants.

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any), estimates and provisional apportionments, shall be published in the manner prescribed in Part II. of the 2nd schedule to this Act, and copies thereof shall be served on the owners of the premises shewn as liable to be charged in the provisional apportionment. During one month from the date of the first publication the approved specifications, plans and sections (if any), estimates and provisional apportionments (or copies thereof certified by the surveyor), shall be kept deposited at the corporation offices, and shall be open to inspection at all reasonable times."

By s. 30, "During the said month any owner of any premises shewn in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may by written notice served on the corporation object to the proposals of the corporation on any of the following grounds (that is to say), (*a*) that an alleged street or part of a street is not and does not form part of a street within the meaning of this Act; (*b*) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large. . . . ."

By s. 31, "(1.) The corporation at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors, and at the time and place so appointed any such Court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case as if the corporation were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The Court may quash in whole or in part or may amend the resolution, plans, sections, estimates and provisional apportionments, or any of them, on the application either of any objector or of the corporation. The Court may also if it thinks fit adjourn the hearing and direct any further notices to be given.

"(2.) No objection which could be made under this Act shall be otherwise made or allowed in any Court, proceeding, or manner whatsoever.

"(3.) The costs of any proceedings before a court of summary jurisdiction in relation to objections under this Act shall be in the discretion of the Court, and the Court shall have power if it thinks fit to direct that the whole or any part of such costs ordered to be paid by an objector or objectors shall be paid in the first instance by the corporation, and charged as part of the expenses of the works on the premises of the objector or objectors in such proportions as may appear just."

These sections of the Wakefield Corporation Act, 1887, are practically identical with ss. 6, 7, 8 of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57).

The question is not res judicata. The decision of the magistrates in 1898 was merely a decision quashing the resolution, and the reason given for it—namely, that Sludge Lane was a highway repairable by the inhabitants at large—was not part of the decision and is not binding. The decision in *Reg.* v. *Hutchings* (1) is therefore absolutely in point. Even, however, if the finding that Sludge Lane was a highway repairable by the inhabitants at large was part of the decision of the magistrates in 1898, it cannot refer to the additional part of Sludge Lane now under consideration, nor can it affect parties who were not then before the Court.

Danckwerts, K.C. (*Alexander Glen* with him), for some of the respondents. The decision in *Reg.* v. *Hutchings* (1) does not apply. That case turned on the entirely different procedure which was provided by s. 150 of the Public Health Act, 1875. The decision of the justices in 1898 was given on ss. 29 to 31 of the Wakefield Corporation Act, 1887, which, like ss. 6 to 8 of the Private Street Works Act, 1892, gave the justices power to adjudicate on the objection that the highway in question was a highway repairable by the inhabitants at large. Their decision in 1898 was therefore a judgment in rem and affected the status of the street, and until that decision has been reversed or set aside it is binding in all proceedings in regard to the same street: *Reg.* v. *Inhabitants of Hartington* (2); *Reg.* v. *Inhabitants of Haughton* (3); *Reg.* v. *Blakemore.* (4)

Compston, for the other respondents, was not heard.

Macmorran, K.C. The Wakefield Corporation Act, 1887, and the Private Street Works Act, 1892, have not altered the law as laid down in *Reg.* v. *Hutchings.* (1) [He referred to *Twickenham Urban Council* v. *Munton.* (5)]

Cur. adv. vult.

Dec. 16. The judgment of the Court (Lord Alverstone C.J., Darling, and Channell JJ.) was read by

LORD ALVERSTONE C.J. This is an appeal from a decision of the justices of the city of Wakefield deciding that certain

(1) 6 Q. B. D. 300.
(2) (1855) 4 E. & B. 780.
(3) (1853) 1 E. & B. 501.
(4) (1852) 2 Den. C. C. 410.
(5) [1899] 2 Ch. 603.

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proceedings, under the Wakefield Corporation Act, 1887, for providing for the expense of paving, metalling, and channelling a certain street of the city, were invalid, on the ground that, in similar proceedings taken in the year 1898, it had been decided by the justices having jurisdiction in the matter that part of the street to which the proceedings relate was a highway repairable by the inhabitants at large. The matter arises under ss. 29 to 31 of the Wakefield Corporation Act, 1887, which contain provisions analogous to those in s. 150 of the Public Health Act, 1875, and practically identical with ss. 6 to 8 of the Private Street Works Act, 1892. The point raised for our decision is whether a finding of the magistrates, upon a proceeding properly taken under s. 30 of the Act of 1887, to the effect that a street is a highway repairable by the inhabitants at large, is conclusive in any subsequent proceedings for apportionment, whoever may be the parties to the subsequent proceedings. In the case of *Reg.* v. *Hutchings* (1) it was decided by the Court of Appeal that an adjudication by justices, upon a summons to recover the amount of an apportionment made under s. 150 of the Public Health Act, that a street was a highway repairable by the inhabitants at large, did not prevent the local authority from subsequently claiming the amount of apportionment in respect of the same street under proceedings subsequently taken. It was, however, contended before us that the provisions of s. 31 of the Act of 1887, and the corresponding provisions of s. 8 of the Private Street Works Act, 1892, had altered the law in this respect, that proceedings under these sections were of the nature of proceedings in rem, since they affected the status of the street, or that, at least, they were conclusive and final as between the corporation and the persons who, either themselves or their predecessors in title, had been parties to the earlier proceedings. It was urged that under sub-s. (*b*) of s. 30 the owner of premises, shewn, in a provisional apportionment, liable to be charged, could object upon the ground, amongst others, that the street in question was a highway repairable by the inhabitants at large, and that under sub-s. 1 of s. 31 a court of summary jurisdiction was to

(1) 6 Q. B. D. 300.

appoint a time for determining the matter of all objections, and might proceed to hear and determine the matter of all such objections in the same manner as if the corporation were proceeding summarily against the objectors to enforce payment, and, further, that by sub-s. 2 of the same section it was provided that "no objection which could be made under this Act shall be otherwise made or allowed in any Court, proceeding, or manner whatsoever." It was argued that these provisions shew that any objection which could be raised by objectors was to be determined once and for all, not only as regards the apportionment then under consideration, but for the purposes of any future proceedings under the same section. The consequences of such a view are very far-reaching. For example, although some only of the owners liable to be charged may have taken objections, the finding would be held binding upon other owners or persons entitled to object, who were no parties to the proceedings. If the justices had power to determine finally and as against all parties that a street was a highway repairable by the inhabitants at large, they must have power to determine that it was not, and in that case a serious injury might be inflicted, because other owners might be in a position to produce quite different evidence from that on which the decision proceeded. Still, the consequences of giving effect to this contention would not be sufficient to prevent us from so holding, if the language of the section, fairly read, leads to that conclusion. But, in our opinion, the provisions were enacted with an entirely different object, and not, as was suggested, with the view of altering the law as laid down in the case of *Reg.* v. *Hutchings*. (1) We think that the objects of ss. 30 and 31 were to enable objectors to raise objections to the apportionment before any expense had been incurred, and also to enable preliminary points to be determined at an early stage, which it would be practically useless to raise upon a summons to recover the apportioned amount. Under s. 150 of the Public Health Act the urban authority were compelled, before they could take proceedings to recover the amount, to execute the work. The section in question—s. 30

(1) 6 Q. B. D. 300.

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Lord Alverstone C.J.

of the Act of 1887—allows owners to raise questions as to the character of the proposed works, the propriety of the estimate, the sufficiency of the plans, and other matters which, if they are to be raised at all, should be raised before the works are executed. We think that the real jurisdiction given to the justices is that contained in the concluding words of sub-s. 1 of s. 31, "quash in whole or in part, or may amend the resolution, plans, sections, estimates, and provisional apportionments," and that the earlier words, "appoint a time for determining the matter of all objections," and the words "and shall proceed to hear and determine the matter of all such objections," are only intended to enable the justices to determine the questions which, as provided by s. 30, may be raised by the persons entitled to object. This determination enables the justices to quash, or amend, or confirm the resolutions, plans, estimates, and provisional apportionments. In this view the reasoning of the Court of Appeal in *Reg.* v. *Hutchings* (1) applies to this case, and we think that the objection, taken on behalf of the objectors, that there has been a previous determination that the street in question was a highway repairable by the inhabitants of the city at large, was no bar to proceedings taken in this case. It is unnecessary to consider the other points which were raised on behalf of the appellants.

Appeal allowed.

Solicitors for appellants: *Sharpe, Parker & Co., for Hudson, Wakefield.*

Solicitors for respondents: *S. F. Taylor, for J. B. Cooke, Wakefield; Radford & Frankland, for Fernandes, Wakefield.*

(1) 6 Q. B. D. 300.

A. P. P. K.

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED.]

1901
Dec. 14.

THE KING *v.* LINES.

Criminal Law—Game—Night Poaching—Previous Convictions—Person "so offending" a Third Time—Night Poaching Act, 1828 (9 *Geo.* 4, *c.* 69), *ss.* 1, 9.

Sect. 1 of the Night Poaching Act, 1828, provides that, if any person by night enters upon any land with any gun or other instrument for the purpose of taking or destroying game, he shall for the first and second offences be liable to certain penalties on summary conviction, and "in case such person shall so offend a third time" he shall be guilty of a misdemeanour:—

Held, that on an indictment for a third offence two previous convictions under s. 1 must be alleged and proved, and that a previous conviction under s. 9 of the Act of the misdemeanour of entering upon land by night armed and to the number of three or more for the purpose of taking game was not a previous conviction within s. 1.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the deputy chairman of the Bedfordshire Quarter Sessions.

At the general quarter sessions of the peace for the county of Bedford, holden at Bedford on October 30, 1901, John Lines was tried on the following indictment:—

"Bedfordshire to wit. The jurors for our Lord the King upon their oath present that John Lines on the twenty-seventh day of January, in the year of Our Lord One thousand eight hundred and seventy-nine, at the Court of Oyer and Terminer and general gaol delivery held at Hertford in and for the county of Hertford, was in due form of law convicted on a certain indictment for that he, the said John Lines, with three other persons, in the night of the eleventh day of November in the year of Our Lord One thousand eight hundred and seventy-eight, together being there by night respectively armed with bludgeons, did there together by night armed as aforesaid unlawfully enter certain lands in the occupation of Lord Brownlow (1), situate in the parish of Studham, in the county

(1) *Sic.*

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of Hertford, for the purpose therein of taking and destroying game contrary to the statute in that behalf, and the said John Lines being then so convicted as aforesaid was then and there adjudged and sentenced to a term of penal servitude for five years.

"And the jurors aforesaid upon their oath aforesaid do further present that after the said John Lines had been so convicted as aforesaid, to wit, on the seventeenth day of November, in the year of Our Lord One thousand eight hundred and eighty-six, the said John Lines, at Great Berkhampstead, in the county of Hertford, was duly convicted before Dudley H. Ryder and A. P. Paston Cooper, two of Her late Majesty's justices for the said county of Hertford, for that he, the said John Lines, in the night of the sixteenth day of November, in the year of Our Lord One thousand eight hundred and eighty-six, did then by night then and there unlawfully enter land situate in the parish of Studham, in the said county of Hertford, in the occupation of the Right Honourable Earl Brownlow, with a gun, for the purpose then and there of taking and destroying game contrary to the statute in that behalf, and, the same being his second offence in that behalf, the said John Lines was for such last-mentioned offence committed to prison for a term of six calendar months, there to be kept to hard labour, and was then and there further ordered at the expiration of such last-named sentence to find sureties by recognizance himself in 20*l.*, and two sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for the space of two years then next following, and in default of such sureties to be imprisoned and kept to hard labour for a further term of six calendar months.

"And the jurors aforesaid upon their oath aforesaid do further present that the said John Lines afterwards, and after he had been so twice convicted as aforesaid, to wit, on the nineteenth day of December, in the year of Our Lord One thousand eight hundred and ninety-nine, by night, to wit, about the hour of 5.30 in the night of the same day, did unlawfully enter certain land, situate at Whipsnade, in the

county of Bedford, in the occupation of Arthur Macnamara, and was then by night unlawfully in the said land with a certain gun for the purpose by night as aforesaid of therein taking and destroying game against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity."

Mr. C. E. Dyer, counsel for the prisoner, objected at the trial that the indictment was bad, inasmuch as it disclosed no identical offence; that, the offence for which the prisoner stood indicted being an offence against s. 1 of the Night Poaching Act, 1828 (1), an indictment for such offence would only lie in the case of a person who "so offended" a third time; that the first of the previous convictions mentioned in the indictment shewed on the face of it that it was an offence against s. 9 of the statute, and not against s. 1; that the punishment for a third offence under s. 1 of the statute was of

(1) By the Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1, "If any person . . . . shall by night unlawfully enter or be in any land . . . . with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall upon conviction thereof before two justices of the peace be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance . . . . himself in 10*l*., and two sureties in 5*l*. each, or one surety in 10*l*., for his not so offending again for the space of one year next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of six calendar months unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance . . . . himself in 20*l*., and two sureties in 10*l*. each, or one surety in 20*l*., for his not so offending again for the space of two years next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of one year unless such sureties are sooner found; and in case such person shall so offend a third time he shall be guilty of a misdemeanour . . . ."

By s. 9, "If any persons to the number of three or more together shall by night unlawfully enter or be in any land . . . . for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanour . . . ."

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a cumulative nature, and that liability to indictment under s. 1 was dependent on the fact of the prisoner having been dealt with for his previous offences summarily in the manner provided by s. 1, whereas for an offence under s. 9 a prisoner expiated his offence by the punishment awarded, and owed nothing further to the law. The deputy chairman held, on the authority of *Rex* v. *Ball* (1), that the offence for which the prisoner was convicted under s. 9 was also an offence under s. 1, although, from the circumstances of aggravation which accompanied it, it was punishable under s. 9, and that the power to indict under s. 1 was dependent upon the offence being a third offence, and that, if the first and second offences were in fact offences against s. 1, it did not matter under what section the prisoner had been convicted or before what tribunal he had been tried. He further held that the point as to the punishment which the prisoner had suffered in respect of his first offence did not affect the validity of the indictment.

The jury found the prisoner guilty, and the previous convictions were duly proved. Judgment was respited until the decision of the Court for Crown Cases Reserved should be known.

The question for the decision of the Court was whether the first of the previous convictions set out in the indictment could be treated as a first conviction for the purpose of the indictment.

No counsel appeared for the prisoner.

Lord Coleridge, K.C. (*Stimson* with him), for the prosecution. The conviction was right. An offence under s. 9 may also be an offence under s. 1, although from circumstances of aggravation it receives a more serious punishment: *Rex* v. *Ball*. (1) No doubt s. 1 contemplates two previous summary convictions; but, as the greater includes the less, it is sufficient to prove one summary conviction, and one conviction under s. 9, to give the Court jurisdiction to deal with the prisoner as for a third offence against s. 1.

(1) (1832) 1 Moo. C. C. 330.

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LORD ALVERSTONE C.J. In this case the question we have to decide is whether the previous proceedings against this prisoner are sufficient to make him guilty of the offence of "so offending" a third time within the meaning of s. 1 of 9 Geo. 4, c. 69. It is suggested for the prosecution that a conviction for an offence under s. 9 of the same Act practically includes a conviction for an offence under s. 1, because the greater includes the less, and that as the first count of the indictment shews that the prisoner had been convicted under s. 9 of having unlawfully entered certain lands by night with three other persons respectively armed with bludgeons for the purpose of taking game, that must be taken as being a conviction under s. 1 for entering on land with any gun, net, engine, or other instrument for the purpose of taking or destroying game. It is true that part of the offence created by s. 9 is the unlawful entering upon the land; but when the words of that section are looked at, it seems to me that the essence of the offence is the being armed with offensive weapons, and that the section contemplates the offence of going armed with such weapons as might lead to serious assaults.

Sect. 1 provides that only if a person "shall so offend a third time" he shall be guilty of an indictable offence, and the previous offences must therefore, I think, be offences against s. 1. In this case there is not sufficient evidence of two previous convictions under that section to justify his conviction.

As to the case of *Rex* v. *William Ball* (1), on which the deputy chairman of quarter sessions relied, it does not seem to me to be an authority for the proposition for which it is cited. In that case the question arose under s. 2 of the Act as to the power to apprehend offenders, and it was held that there was power to apprehend persons committing an offence under s. 9, although the power to apprehend contained in s. 2 related to offences under s. 1, since the prisoners in question were guilty of an offence under s. 1 as well as under s. 9.

I do not, however, think that we can treat a conviction for an offence under s. 9 as being a conviction for an offence under s. 1 so as to enable the Court to deal with the prisoner in this

(1) 1 Moo. C. C. 330.

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case as for a third offence against s. 1. I therefore think that this conviction must be quashed.

LAWRANCE, WRIGHT, BRUCE, and DARLING JJ. concurred.

Conviction quashed.

Solicitors for prosecution: *Austin & Austin, for W. Austin, Luton.*

A. P. P. K.

C. A.

1901

Nov. 25.

[IN THE COURT OF APPEAL.]

CATTERMOLE *v.* THE ATLANTIC TRANSPORT COMPANY, LIMITED.

Employer and Workman—Compensation—Employment on, in, or about a Ship in a Dock—Ship Loading in Dock—Action against Employer—Failure to prove Liability of Employer—Assessment of Compensation under Workmen's Compensation Act, 1897 — *Costs of Proceedings — Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 4; *s.* 7, *sub-ss.* 1, 2, *Sched. II.* (6).

A workman employed in loading or unloading a ship lying in a dock is employed on or in or about a factory within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897.

Where on the failure of an action brought, under the Employers' Liability Act, 1880, to recover damages for injury caused by an accident compensation is assessed under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, the Court before which the action is tried has power to deal with the costs, including costs of the proceedings for the assessment of compensation.

APPEAL from an award of the county court judge of Bow under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897.

An action was brought, under the Employers' Liability Act, 1880, and Lord Campbell's Act (9 & 10 Vict. c. 93), by the widow of a workman who met with his death while in the employment of the defendant company. He was employed on a steamship which was lying in the West India Docks alongside one of the quays, and he was assisting at one of the holds to take in cargo, with the ship's own machinery, from a vessel which lay alongside the steamer. Cargo was also being taken

in, by means of an hydraulic crane on the quay, at two other holds. At the hearing the judge came to the conclusion that the defendants were not liable in the action, but that they would have been liable to pay compensation under the Workmen's Compensation Act, 1897. He accordingly dismissed the action; and at the request of the plaintiff compensation was assessed under s. 1, sub-s. 4, of the Act. A certificate was given for the sum of 234*l.*, and an order made that the defendants should pay to the plaintiff her costs of and incident to the proceedings.

The defendants appealed.

Nov. 12. *B. D. Kilburn*, for the defendants. The first objection to the award is that the deceased was not employed on or in or about a factory within s. 7 of the Act. He was not employed in connection with machinery on the quay as in *Woodham* v. *Atlantic Transport Co.* (1), but in loading from another vessel in the dock as in *Hennessey* v. *McCabe* (2), where loading was going on from a lighter, and the case was held not to be within the Act. In *Raine* v. *Jobson* (3) the ship was in a dry dock in the hands of ship repairers. She had lost the character of a ship, and had become merely a part of the dry dock, which unquestionably was a factory. Even if a wet dock might be considered a factory, a ship afloat in such a dock has never been held to be a factory. *Flowers* v. *Chambers* (4) was not overruled in *Raine* v. *Jobson* (3), for both in the latter case and in *Merrill* v. *Wilson* (5) a factory was admitted to exist. If a ship afloat in a wet dock could properly be treated as a factory, on the ground that some of the provisions of the Factory Acts were applicable to it, there would have been no need for any arguments in *Stuart* v. *Nixon* (6) as to loading or unloading in a dock.

The second objection is to the order as to costs. The judge has given the plaintiff, who failed in the action and became an applicant under the Workmen's Compensation Act, the costs

(1) [1899] 1 Q. B. 15.
(2) [1900] 1 Q. B. 491.
(3) [1901] A. C. 404.
(4) [1899] 2 Q. B. 142.
(5) [1901] 1 K. B. 35.
(6) [1901] A. C. 79.

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of the proceedings. So far as this order relates to the costs of the action which has been dismissed they must follow the event, and the only power given is to deduct them from the compensation. So far as the order relates to the proceedings under the Workmen's Compensation Act, the judge had no power to deal with them. The provisions of s. 1, sub-s. 4, give a remedy to the applicant in certain cases, and the only power of the Court arises under that section, which makes no mention of any costs but those of the action. The ordinary jurisdiction over costs does not apply in such a case. This is the view that was taken by Rigby L.J. in *Skeggs* v. *Keen*. (1) [He cited also *Edwards* v. *Godfrey*. (2)]

W. B. Yates, for the applicant, was called on as to the question of costs. Under Sched. II., cl. 6, costs are in the discretion of the arbitrator, and there is nothing in the Act to exclude from this provision the costs of an arbitration under s. 1, sub-s. 4. In *Skeggs* v. *Keen* (1) the question as to the power to give costs was not decided by the Court; and, further, the workman went on with the action, which proved to be abortive, after an offer had been made.

Cur. adv. vult.

Nov. 25. The judgment of the Court (Collins M.R., Stirling L.J., and Mathew L.J.) was read by

STIRLING L.J. This is an appeal by the Atlantic Transport Company from an award made by the judge of the Bow County Court under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, consequent on the failure of an action brought against the company in the county court under the Employers' Liability Act, 1880, and Lord Campbell's Act.

The action was brought by Mary Cattermole, the widow of a workman, in respect of a fatal injury by accident, caused to the workman in the course of his employment on board the company's steamship *Minnesota*. At the time of the accident this ship was lying in the West India Docks alongside one of the quays, and was taking in cargo partly from the quay and partly from a schooner which lay alongside the steamer in the

(1) (1899) 1 W. C. C. 35. (2) [1899] 2 Q. B. 333.

dock. The judge determined that the injury in respect of which the plaintiff claimed damages in the action was one for which the defendants were not liable in the action, but that the defendants would have been liable to pay compensation in respect of such injury under the Workmen's Compensation Act, 1897; and thereupon, at the request of the plaintiff, proceeded to assess the compensation which the company would have been liable to pay under the Act. He assessed such compensation at the sum of 234*l.*, and ordered the defendants to pay the plaintiff's costs of and incident to the proceedings.

Two points were raised on the appeal: first, that the workman was not employed on, in, or about a factory within the meaning of the Workmen's Compensation Act, 1897; secondly, that the judge had no power to give the plaintiff any costs of the proceedings.

As to the first point, the question is whether we ought to follow the decision of this Court in *Flowers* v. *Chambers* (1), or that of the House of Lords in *Raine* v. *Jobson*. (2) In the first-mentioned case it was held by this Court that a workman employed on a ship lying in a wet dock was not employed in, on, or about a dock within the meaning of the Act. In *Raine* v. *Jobson* (2) the House of Lords determined that a workman employed on a ship lying in a dry dock was employed on, in, or about a dock within the meaning of the same Act.

Now, the Act speaks of a dock in general terms, without reference to whether it is wet or dry: primâ facie, therefore, the two decisions are inconsistent, and that of the House of Lords ought to be followed. This view is confirmed when the ratio decidendi in the two cases is examined. In *Flowers* v. *Chambers* (1) the late Master of the Rolls said: "If the Legislature had intended that ships should be brought within the purview of the Act, it would have been perfectly simple to have put the word 'ship' in the section; they have, however, chosen words expressive of certain localities to which the application of the Act is limited, and a ship is not one of them." On the other hand, in *Raine* v. *Jobson* (2) the Lord Chancellor said: "I am not able at present to follow the train of reasoning

(1) [1899] 2 Q. B. 142. (2) [1901] A. C. 404.

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by which the respondents sought to suggest that because the wooden structure which was inside the dock, and to which the work was being applied, was a ship which when floated into the sea would be capable of being treated as a separate entity, and would be free from the operation of the Act generally, that conveys to the dock in which the ship is placed the immunity which the ship itself would possess if sailing upon the high seas." In our opinion, the decision of the learned judge on this point cannot be disturbed

The second point raises a question which was left undecided by this Court in *Skeggs* v. *Keen* (1), namely, whether the judge had power to give the unsuccessful plaintiff any costs upon the assessment of compensation under s. 1, sub-s. 4, of the Act.

The effect of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1897, is to compel the workman to elect whether he will claim compensation under the Act, or take such proceedings as were open to him before the Act. If he adopts the latter course, he cannot make any claim under the Act except by virtue of s. 1, sub-s. 4, of the Act: see *Edwards* v. *Godfrey*. (2) That sub-section provides that if an action is brought to recover damages independently of the Act, for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of the Act, the action shall be dismissed, "but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which in its judgment have been caused by the plaintiff bringing the action instead of proceeding under this Act." The sub-section goes on to direct that the compensation awarded, and the directions as to deduction of costs, are to be embodied in a certificate which is to have the effect and force of an award under the Act, but says nothing further as to the costs; and it is contended that the power of the judge to deal with compensation is entirely derived from this section, and cannot extend beyond what is thereby expressly conferred. In *Skeggs* v. *Keen* (1)

(1) 1 W. C. C. 35.

(2) [1899] 2 Q. B. 333.

Rigby L.J. stated that the inclination of his opinion was to that effect; but neither he nor any of the members of the Court gave a decision on the point. If this contention be well founded, the result will be that the workman not only will be liable to have all costs caused by his bringing the action instead of proceeding under the Act deducted from the compensation, but will have to bear all his own costs, although successful in recovering compensation; whereas, according to the ordinary practice as regards costs, he ought to have the costs of successful proceedings, except in so far as they are increased by any part of those proceedings which fails, and ought to bear all costs occasioned by such failure. It is true that in the Workmen's Compensation Act itself (Sched. II. cl. 6) express provision is made for the costs of proceedings by arbitration under the Act; but here the Legislature is dealing with proceedings in and consequent on an action, over the costs of which the Court which tries the action would have full control by the exercise of its ordinary jurisdiction.

It will be observed that s. 1, sub-s. 4, treats such an action as one in which it may be determined both that the employer is not liable for damages, and also that he would have been liable to pay compensation under the provisions of the Act: evidence as to the liability under the Act may, therefore, be adduced in the action. The sub-section does not indeed refer to the assessment of compensation as being made in the action, but such assessment certainly arises out of and is consequent upon it, and it would be a refined distinction to hold that while the determination of the liability to pay compensation is a proceeding in the action, the assessment of the amount is not. In our judgment the effect of the sub-section is to leave the Court in which the action is tried full liberty to exercise any power of awarding costs which it may have in the action, and to confer the additional power of deducting from the compensation costs caused by the plaintiff bringing the action instead of proceeding under the Act. Such costs, it may be observed, do not necessarily include all the costs of the action. In general the court to try such actions is a county court. By s. 113 of the County Courts Act of 1888, all the costs of any action or matter in a

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county court, not otherwise provided for by that Act, are to be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction are to abide the event. By s. 186, "Action . . . . shall mean every proceeding in the Court which may be commenced as prescribed by plaint," and "Matter shall mean every proceeding in the court which may be commenced as prescribed otherwise than by plaint," and "Prescribed shall mean prescribed by the County Court Rules for the time being." By Sched. II. cl. 10, of the Workmen's Compensation Act, 1897, the duty of a county court judge under this Act is, subject to rules of court, to be part of the duties of the county court.

We think that under these enactments the county court has power to deal with the costs of the action, including the proceedings for the assessment of compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897. If the court in which the action is tried be the High Court, as may be the case either where the action is originally brought in the High Court, or where, being originally brought in the county court, it is transferred to the High Court (see, e.g., s. 6 of the Employers' Liability Act, 1880), the High Court has full power to deal with costs under s. 5 of the Judicature Act, 1890. The learned judge has dismissed the action, but has ordered the defendants to pay all the costs of the proceedings, and has not ordered any costs to be deducted from the compensation. In general this would not be right; but such an order may be justified by special circumstances, as if, for example, the judge were satisfied that no costs had been caused by the plaintiff bringing an action instead of proceeding under the Act. This matter is one within the discretion of the judge; it has not been shewn that the judge exercised that discretion on a wrong principle; and in the result the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *Roland H. Ward.*
Solicitors for defendants: *Holman, Birdwood & Co.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 8.

McGRATH *v.* NEILL & SONS.

Employer and Workman—Compensation—Building exceeding Thirty Feet in Height—Lowest Point from which to Measure—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

On an application for compensation under the Workmen's Compensation Act, 1897, it was proved that the applicant was injured in the course of his employment on a building which, whether measured from the bottom or from the top of the footings, was more than 30 feet in height. There was evidence that, at the time of the accident, the footings had been filled in, and that the building had not reached the stage at which more than the footings had been covered in. The county court judge took the lowest part of the footings as the point from which to estimate the height of the building, and made an award in favour of the applicant. On appeal:—

Held, that the height of the building to be determined was the height at the time of the accident, and, there being no evidence that at that time anything more than the footings had been covered in, the height of the building might have been taken from the top of the footings, and, as the height so measured exceeded 30 feet, the award must be upheld.

APPEAL from a decision of the judge of the Manchester County Court on an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employment of the respondent firm, and was injured by an accident arising out of and in the course of his employment. At the time of the accident he was employed on a building which was being constructed by means of scaffolding, and the question raised was whether the building exceeded 30 feet in height so as to be within s. 7 of the Act. The judge found as facts that the second floor joist was the highest point of the building, and that measuring to that point the height was—(1.) from and including the footings, 33 ft. 2½ in.; (2.) from the top of the footings, 31 ft. 2½ in.; (3.) from the basement floor, 29 ft. 10 in.; (4.) from the level of the street, 23 ft. 5¾ in. The learned judge rejected the fourth method of measurement as being

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unsuitable for want of certainty, since few streets are on an absolute level, many are on distinct slopes, and a building may be surrounded by different streets at different levels. He rejected the third alternative on the ground that the basement of a house in course of erection was often full of débris, might have trenches in it, and in most cases was not of a uniform level; so that a certain and definite measurement would not be arrived at. He thought that either of the other alternatives would give a definite measurement, but that the first was the right one, on the ground that the footings were part of the building, and that the height should be determined by measuring from the lowest point of the actual building to the highest point that it had attained, no heed being paid to street levels, basements, or trenches in which the building might be placed. He therefore found that the height of the building exceeded 30 feet, and made an award in favour of the applicant.

The employers appealed.

Clavell Salter, for the employers. The judge decided this case on a matter of principle, and based his decision on practical convenience. Even from that view the decision is unsatisfactory, because the footings of a building may be at entirely different levels. No system of measurement ought to involve laying bare the footings to ascertain the height of the building. It is not contended that the street level should be taken, but the actual height of a building should be measured from its highest point to the ground. Nothing that is buried in the ground, as footings are, ought to be taken into consideration. In this case it is clear from the third alternative put by the learned judge that there was a basement floor, and that the footings were below ground, and the level of the basement should be taken as the point from which to measure the height of the building. Taking that measurement, the building did not exceed 30 feet in height, and the applicant was not entitled to compensation under the Act. [He cited *Halstead* v. *Thomson & Sons*. (1)]

M'Cleary, for the applicant, was not called upon.

(1) (1901) 3 F. 668.

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Collins M.R. This case raises the question whether the county court judge was wrong in deciding that a building on which the applicant was working exceeded 30 feet in height so as to come within s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897. As my brother Stirling pointed out during the argument, this Court has decided in *Billings* v. *Holloway* (1) that the time when the workman sustained an injury is the time to be taken into account. We have, therefore, to see whether the building exceeded 30 feet in height when the applicant was injured. That must be a question of fact. I can quite understand that a building which is measured from the base before the footings are covered in might in some conditions of fact be considered to be a building exceeding 30 feet in height, and in other conditions of fact might not be so considered. The county court judge was not wrong, in my opinion, in taking the view that the introduction of the limit of 30 feet was not solely in relation to the risk to the workmen, but was out of consideration for a class of builders whose work lies on cottage or other small property, which, as he says, rarely reaches a height of 30 feet however measured; and his view is countenanced by some remarks of Lord Macnaghten in *Hoddinott* v. *Newton, Chambers & Co.* (2), to the effect that "The provision as to the height of the building, and the provision with reference to a scaffolding, serve roughly to draw a line of demarcation between employments with which the Act is not concerned and those to which it is intended to apply. They were intended to exempt a certain class of buildings, and perhaps a certain class of builders of the humbler sort, from the operation of the Act." It is obvious that a building might be of an important character though a part of it were below the level of the ground. All the mischiefs contemplated by the Act, with regard to buildings of that character, when it gave a remedy to workmen employed on that class of building, would still arise in such a case. Therefore, the fact that some portion of the building is below the level of the ground, as finally ascertained, does not take the case out of the provision as to buildings exceeding 30 feet in height. In dealing with

(1) [1899] 1 Q. B. 70. (2) [1901] A. C. 49, at p. 56.

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the question before the county court judge, this Court can only interfere if there was no evidence to support his finding of fact, or if the judge has misdirected himself in point of law. Was there evidence in the case before us on which the judge could find that the building at the time of the accident exceeded 30 feet in height? From the evidence in the case it appears to me that the footings of the building were probably covered in at that time; but there is no indication in the evidence that the lower part of the building had got beyond that stage. Under these circumstances there was evidence on which the judge would have been entitled to take the measurement from the top of the footings, and taking that measurement it appears that the building exceeded 30 feet in height at the time of the accident. The award of the learned judge must, therefore, be supported, and the appeal must be dismissed.

STIRLING L.J. We have to consider whether the building on which the applicant was at work exceeded 30 feet in height. It was decided in *Billings* v. *Holloway* (1) that the period to which attention is to be directed is the time of the accident. It appears to me that the judge should turn his attention to the state of the building at that time. The judge has laid down as a matter of convenience, by way of arriving at a definite point of departure, that the height of the building ought to be measured from the lowest point of the footings. If it is suggested that that rule should be adopted in all cases, I should not see my way to agree with the suggestion, because it seems to me that it would not be consistent with the decision in *Billings* v. *Holloway* (1) that the time of the accident is the point of time to be considered. If, therefore, the learned judge decided this case on the ground that in all cases that rule should be adopted, I should be unable to agree with him; but it is said that there is some evidence that at the time the accident occurred the building had not reached the stage when anything more than the footings had been covered in. If so there was, measuring from the inside level of the building, a height exceeding 30 feet, and on that ground the award in

(1) [1899] 1 Q. B. 70.

favour of the workman could be upheld. I have had some doubt as to whether the evidence comes up to this, but I do not dissent from the result arrived at by the other members of the Court.

Mathew L.J. I agree that there was evidence which justified the county court judge in finding that the building on which the applicant was at work exceeded 30 feet in height at the time of the accident. The learned counsel for the employers has urged that the height of the building must be ascertained by measurement from the level of the street. The case was put during the argument of a building that starts with an excavation 20 feet in depth, and a wall run up from the bottom of the excavation to a height of 20 feet above the top of the excavation. The logical conclusion from the argument would be that the wall would not exceed 30 feet in height. It seems to me that it is an untenable proposition, and I think that the award of the county court judge must be supported.

Appeal dismissed.

Solicitors for applicant: *Chester, Broome & Griffithes, for Crofton, Craven & Worthington, Manchester.*

Solicitors for employers: *Mackrell, Maton, Godlee & Quincey, for P. Holker Jordan & Bowden, Manchester.*

A. M.

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1901
Nov. 14.

[IN THE COURT OF APPEAL.]

BUSH *v.* HAWES.

Employer and Workman—Compensation—Building exceeding Thirty Feet in Height—"Undertakers"—Workman in Employ of Sub-contractor—Work ancillary to Business of Undertakers—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

The respondent, a builder, entered into a contract to erect a building which was to have an iron roof. It was no part of his usual business to construct or erect such a roof, and he had no one in his employment who could do this. He accordingly entered into a sub-contract with a firm to do the work, and one of the workmen employed by that firm was killed while engaged on the work. On an application for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the erection of such a roof was no part of the ordinary business of the respondent, but that it was part of such a business as ordinarily carried on, and was therefore not ancillary to the business carried on by the respondent within the meaning of s. 4 of the Act. On appeal:—

Held, that the test, whether a sub-contract is for work ancillary to the business carried on by the undertaker, is whether the work is that of the particular undertaker, and not whether it is generally undertaken by persons carrying on a similar business.

Knight v. *Cubitt & Co.*, ante, p. 31, distinguished.

APPEAL of the applicant from a decision of the judge of the county court of Norwich on an application for compensation under the Workmen's Compensation Act, 1897, and cross-appeal of the respondent.

The application was by the personal representative of a workman who met with his death from an accident in the course of his employment. The building upon which the deceased was at work was a boiler-house for driving machinery, and a chimney adjoining the end of the boiler-house, with a flue connecting the two. The height of the chimney was more than, and of the boiler-house less than, thirty feet. The respondent had contracted to build the premises, and had entered into a sub-contract with the firm of Hadley & Co. to make and erect an iron roof to the boiler-house. The deceased was in the employment of Hadley & Co., and was sent by them

with other workmen to erect the roof. While employed in doing this he met with the accident which caused his death. Two questions were before the judge in the county court—(*a*) whether the building on which the deceased was engaged was thirty feet in height; (*b*) whether the work on which he was engaged was being done under a contract which was merely ancillary to the trade carried on by the respondent. The first point was decided in favour of the employer, and the second against him, and no award was made.

The evidence given by the respondent on the question whether the contract was ancillary or not was as follows: "The making and fixing this roof is no part of or process in the trade or business of a builder. It is no part of my business to construct or erect such an iron roof as was put up by Messrs. Hadley. I never had in my employment any person to do, or who could do, such work as was done by Messrs. Hadley. A builder may procure an iron roof to be placed on walls that he has erected, but he could not himself do the work or fix it. It is engineering business to put on iron roofs." The learned judge in giving judgment said that he did not think the construction of an iron roof and placing it in position was any part of the process in the trade or business carried on by the respondent, but that he must take the character of the business as it is known generally and as it is generally carried on, and on this ground he found that the putting up of the iron roof formed part of the trade or business of the respondent. On the findings an award of compensation was refused.

The applicant appealed, and there was a cross-appeal by the respondent on the point which was found against him.

W. M. Thompson, for the applicant. The boiler-house and chimney were so attached to each other as to form one building, and it is admitted that the chimney was more than thirty feet in height. The finding of the learned judge on this first point was therefore wrong.

On the second point the finding should be supported, for the business of the respondent was that of a builder, and the judge finds that it is part of such a business to erect an iron roof

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such as was put up in this case. *Knight* v. *Cubitt* (1) is in point.

F. Low, for the employer. The question of the height of the building was one of fact for the judge, and depended on whether the boiler-house and the chimney were separate structures. The mere fact that they were erected for a purpose common to both does not make them one building: *Rixom* v. *Pritchard*. (2)

The question of the sub-contract being ancillary to the trade carried on by the respondent is determined by his evidence, which the learned judge adopted, and cannot depend on what other people in the same trade are in the habit of doing. In *Knight* v. *Cubitt* (1) the employers were in the habit of entering into contracts to do the work which was said to be ancillary to their business.

W. M. Thompson, in reply.

COLLINS M.R. I am of opinion that the cross-appeal should be allowed. It arises in the case of a workman who met with an accident while working in the employment of sub-contractors, employed by the respondent, who had contracted to erect a building which comprised a boiler-house and shaft. The sub-contractors were employed to put up an iron roof to the building. In order to make good the claim against the respondent the case must be brought within s. 4 of the Act, and the question is whether the last clause of that section applies which exempts the undertaker from liability where the sub-contract applies to "work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on" by the undertakers. If that exemption applies, the applicant has no claim against the respondent. The point taken in the cross-appeal of the employer is that on the facts of this case that exemption is applicable. We have a finding of fact by the learned county court judge based upon the evidence. He says, "I do not think the construction of an iron roof and placing it in position is any part of the trade or business carried on by Hawes," and unless that is displaced

(1) Ante, p. 31. (2) [1900] 1 Q. B. 800.

by another finding we cannot ignore it. Later on in his judgment the learned judge seems, in considering whether a sub-contract is for work merely ancillary or incidental to the trade or business carried on by the undertaker, to make the standard, not whether the work is that of the particular undertaker, but whether it is generally undertaken by persons carrying on a similar trade or business. There is plenty of evidence that the respondent did not do iron work, but always let it out to sub-contractors, and the judge in finding in accordance with that evidence has thereby necessarily negatived the liability of the respondent under s. 4. The case is the converse of *Knight* v. *Cubitt* (1), which was before us lately. There the employers were building a new house, and before they could proceed with that work they had to pull down an existing house. It was, however, proved that they made the work of demolition a regular part of their contracts. As their contracts embraced demolition, the county court judge was justified in finding that work to be part of their business, and not a matter which was merely ancillary thereto. Here the learned judge has found that the erecting the iron roof was not part of the business of the respondent, and he was therefore wrong in saying that it was not merely ancillary.

The cross-appeal must be allowed. The result is that the decision in favour of the respondent will stand; so that it is unnecessary to consider the appeal of the applicant, which will be dismissed, since, whether he is right or wrong upon it, he cannot have an award in his favour.

STIRLING L.J. I am of the same opinion. The case turns on the meaning of s. 4 of the Act, which imposes a liability on undertakers as afterwards defined by the Act in respect of the execution of work by a contractor. In the case of a building the expression "undertakers" means "the persons undertaking the construction, repair, or demolition." The last clause of s. 4 contains a proviso which prevents the application of the section to a contract for the execution of work which is merely ancillary or incidental to, and is no part of, or process in, the

(1) Ante, p. 31.

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trade or business carried on by the undertakers. Applying that to the present case, we have the respondent Hawes undertaking the building of these premises, but for the erection of an iron roof entering into a contract with the firm of Hadley & Co., who sent their workmen to do the work. The judge has found that such work was not part of the trade or business carried on by the respondent, and there was ample evidence on which he could come to that conclusion. This finding is not affected by the view that appears to have been taken by the learned judge that putting up an iron roof would generally form part of such a business as the respondent carried on. The present case, therefore, is not brought within s. 4 of the Act.

MATHEW L.J. In this case the questions are—first, whether the respondent is an undertaker as defined by the Act so as to come within s. 4; and, secondly, whether a contract has been made by him for the execution of work which is ancillary or incidental to the business carried on by him as undertaker. The finding of the learned judge that the work was not part of the business carried on by Hawes was decisive of the case in his favour. I agree that the cross-appeal should be allowed.

Appeal dismissed. Cross-appeal allowed.

Solicitors for applicant: *Pattinson & Brewer.*

Solicitors for employer: *Crowders, Vizard & Oldham, for Mills & Reeve, Norwich.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 12.

PRYCE *v.* THE PENRIKYBER NAVIGATION COLLIERY COMPANY, LIMITED.

Employer and Workman—Compensation—Dependants wholly Dependent—Earnings of Workman at Time of his Death—Money coming to Dependants on Death of Workman—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), *Sched. I., cl.* 1 (*a*), (i.).

In the case of the death of a workman leaving dependants, the test by which to determine whether they were wholly dependent on his earnings at the time of his death, within the meaning of the Workmen's Compensation Act, 1897, is whether what the workman was earning at the time of his death was the sole source to which they could look for maintenance at that time, and the fact that money came to them on the death of the workman cannot therefore be taken into consideration.

APPEAL from a decision of the county court judge of Aberdare on an application for compensation under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a workman who, while in the employment of the respondent company, met with an accident which caused his death. The deceased was earning 3*l.* a week. The liability of the company to pay compensation was not disputed, and they paid 275*l.* into court. The question raised was whether the applicant came within Sched. I., clause 1, (*a*), (i.), as being wholly dependent upon the earnings of her husband at the time of his death, or, under (ii.), as being in part dependent on those earnings. It was admitted that the deceased was at the time of his death possessed of personal estate to the value of 190*l.*, which passed to the applicant as the personal representative of the deceased, and on the argument in the Court of Appeal it was further admitted that 100*l.* of this sum came to the applicant for her personal benefit. The earnings of the deceased were 3*l.* a week, and there was no evidence that he derived any income from the 190*l.* that he had saved, or had any source of income other than his earnings. Under these circumstances the

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learned county court judge refused to take this sum of 190*l.* into consideration, and made an award for the maximum amount of 300*l.*, treating the applicant as wholly dependent on the earnings of her husband at the time of his death.

The employers appealed.

Ruegg, K.C., and *Anton Bertram*, for the employers. The question is what has been the pecuniary loss of the applicant, as in cases under Lord Campbell's Act. The accident that deprived her of the support of her husband's earnings brought into her possession another means of support. Whatever moment is taken, either before or after the death of her husband, the applicant was not wholly dependent on his earnings. In either case when the earnings were cut off there would be another source of support.

S. T. Evans, K.C., and *Benson*, for the applicant. The principles applicable to cases under Lord Campbell's Act have no bearing on the amount of compensation under the Workmen's Compensation Act. In the former case the damages are at large, and no basis on which to compute them is supplied by the Act. Here the Act points out how the amount of compensation is to be arrived at, and the award of the county court judge was the only one that he could make directly he became satisfied that it was a case of total dependency. There was nothing before him to shew any other means of support at the time of the death of the workman than his wages, and the judge was right in not taking into account any sum, whether savings or insurance money or derived from any other source, that came to the applicant only on the death of her husband.

Ruegg, K.C., in reply.

COLLINS M.R. I am of opinion that this appeal should be dismissed. The facts are that a workman was earning 3*l.* a week when he met with an accident that caused his death. A certain sum came on his death to his widow as his administratrix, and it is admitted for the purpose of this argument that 100*l.* of that sum came to her for her personal benefit. The question is whether under these circumstances she was wholly

dependent on the earnings of her husband at the time of his death within the meaning of Sched. I. (*a*), (i.), of the Act. The county court judge found that she was wholly dependent, and it is said that this was a wrong finding, because he ought to have taken into consideration the fact that she received a pecuniary benefit of 100*l.* on her husband's death. It seems to me that to introduce that consideration would be to introduce an element which the Act does not contemplate. The Act in terms, by speaking of earnings, points to matters antecedent to the death of the workman, and the question is whether at a time just antecedent to his death the applicant was wholly dependent on his earnings. That is a question of fact, and there is no evidence in this case of any other source of income. The Act gives the judge no discretion as to the amount of compensation, but it imports as a condition precedent to an award, under this clause of the schedule, that there should be entire dependence. I understand by the words "wholly dependent" that there was no other source of income during the lifetime of the deceased other than his earnings on which the applicant was dependent. It is said that the inquiry should be whether after the death of the husband, and taking all sources of income into account, the position of the widow could be properly described as one of dependence on the earnings of her deceased husband. That is asking the Court to say that an applicant to be wholly dependent on a workman's earnings must be a person who is reduced to destitution by his death. The Act does not say this, and if it had said so very serious complications would have been introduced in arriving at the amount of compensation. The scheme of the Act was to take the fixing of the amount to be awarded out of the hands of the judge, and in order to avoid the necessity for embarking on a troublesome inquiry an arbitrary standard is fixed. There are very good reasons why that should be done, so as to get rid of inquiries as to the condition and means of livelihood of the dependents in aftertimes. The only time at which to draw the line is the time of the death of the workman, and sources of income which may arise after that date cannot be taken into consideration. The words of

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the Act are so clear that we should be taking upon ourselves the functions of the Legislature if we departed from their plain meaning. In the present case there is no evidence that there was any other source of income during the lifetime of the deceased than his earnings, and the learned county court judge was right in the course that he took. The appeal should, therefore, be dismissed.

STIRLING L.J. I agree. An admitted factor in this case is that the deceased was possessed of a sum of money by which the widow benefited to the extent of 100*l.*, but which, so far as we know, was not producing any income during the lifetime of the workman. The question is whether, owing to her receipt of this money, the widow is precluded from saying that she was wholly dependent on her husband's earnings at the time of his death. Put broadly, the test raised by the Act is whether what the workman was earning at the time of his death was the sole source to which the applicant could have looked for maintenance at that time. From this point of view the decision of the learned county court judge not to take into consideration money coming to the applicant at a later date was perfectly right.

MATHEW L.J. I am of the same opinion. We are asked to translate the plain words of the Act so that they shall mean that the widow of a deceased workman is not to be entitled to compensation under this clause of the schedule to the Act unless she has been reduced to absolute poverty; for this must be the effect of saying that if anything comes to her out of her husband's estate she is not wholly dependent on his earnings. The Act never contemplated that on the death of a workman there should be an inquiry such as would take place in an administration suit as to whether his debts and liabilities swallowed up the whole or a greater part of what he left. It is only necessary to shew that the applicant was dependent at the time of the death of the workman on his earnings, and there is no provision that inquiry shall be made as to a sum of money under an insurance or otherwise coming to the applicant

on the death of the workman. There is nothing to shew an intention that the Court should deal with such matters, and I think the judge was right in declining to take into consideration anything but the earnings of the deceased.

Appeal dismissed.

Solicitors for applicant: *Riddell & Co., for Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitor for employers: *H. P. Becher, for Simons & Powell, Pontypridd.*

A. M.

[IN THE COURT OF APPEAL.]

BARTELL *v.* W. GRAY & CO.

Employer and Workman—Compensation—Ship in Dock—Factory—Undertakers—"Actual Use or Occupation"—Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A firm of employers contracted to do the painting and plumbing on a ship lying in a dock, and sent workmen on board to do the work. Some of the crew were in charge of the ship for the owners, but the firm were in possession of the ship so far as was necessary for the work that they had contracted to do. One of the workmen was injured by an accident in the course of his employment. On an application to recover compensation under the Workmen's Compensation Act, 1897:—

Held, that the ship was a factory within the meaning of the Act, and that the possession of the shipowners, for a purpose not inconsistent with the possession of the employers, did not prevent the latter from having the actual use or occupation of the ship within the meaning of the Factory and Workshop Act, 1895.

APPEAL from a decision of the judge of the Bow County Court on an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employment of the respondents, Messrs. W. Gray & Co., and he met with an accident while at work on a steamer belonging to the New Zealand Shipping Company, and lying in the Royal Albert Dock alongside a wharf. The steamer was being fitted as a transport, and Messrs. W. Gray & Co. had taken a contract to

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do the painting and plumbing required on the vessel. They sent workmen on board, and among others the applicant, who was engaged in painting the booby-hatch when he met with the accident. Some of the crew of the ship were on board in charge of her for the owners, and a member of the firm of W. Gray & Co. stated that they were in possession of the ship so far as was necessary for the work that they had contracted to do. The contention in the county court for the employers was that they were not liable to pay compensation as they had not the actual use or occupation of the dock or wharf or any part thereof within s. 23 of the Factory and Workshop Act, 1895, and had not the exclusive use or occupation or the general control of the ship. The county court judge made an award in favour of the applicant.

The employers appealed.

Nov. 15. *A. Powell*, for the employers. In order to bring this case within the Workmen's Compensation Act, 1897, s. 7, sub-s. 2, the applicant must shew that the employers were the persons who had the "actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof," within the meaning of the Factory and Workshop Act, 1895, s. 23, sub-s. 1. Where a person, who has contracted to paint portions of a ship within a dock, the ship remaining in the possession of the shipowners, sends workmen on board the ship to perform that contract, he cannot be said to have the actual use of the dock or any premises within the same or forming part thereof. If the possession of the whole ship were given over to him for the purpose of painting her, then possibly he might be said to have the actual use or occupation of a portion of the dock within the section. But here the possession of the ship as a whole was not given up by the shipowners, for part of the crew were on board. Nor does possession of any defined part of the ship appear to have been given to the employers for the purpose of performing their contract—for all that appears they were merely painting the booby-hatch. There would, no doubt, be other contractors on board the ship occupied in the work of refitting her, such as

carpenters. The Act speaks of "the person" having the actual use or occupation, shewing that it contemplates that there will be one such person. It cannot mean that every person who has in the course of business to come into a part of a ship in a dock has, for the purposes of the Act, the actual use or possession of that portion of the ship where for the time being he is in the performance of his business. A painter or a plumber who comes into a house occupied by a tenant to do work cannot be said to be the person who actually uses or occupies the house, or any defined or definite portion of it. Possibly a decorator to whom possession of the whole house was given up in order that it might be decorated throughout might be said to be such a person. But here the whole ship was certainly not given up to the contractors. If they came within the definition, the result would follow that all the stringent regulations of the Factory Acts with regard to giving notice of accidents, and inspection and dangerous machinery and other such matters, must apply, which cannot have been intended: *Nash* v. *Hollinshead*. (1) The employers could not have been convicted under the Factory Acts, for breach of the rules laid down in those Acts, if the only evidence that they were occupiers of a factory consisted of the facts given in evidence in this case. In the case of *Merrill* v. *Wilson* (2) it was held that, when the owners of a ship moored alongside of a quay, who acted as their own stevedores, had the use of a portion of the quay, alongside of which their ship lay, for the purpose of unloading the ship's cargo on to the quay, they had the "actual use" of a portion of the quay, within the meaning of the Act. But in that case there was practically the exclusive use of a defined portion of the quay. There was no such use here of any defined portion of the ship. [He also cited *Raine* v. *Jobson* (3); *Francis* v. *Turner* (4); *Low* v. *Abernethy*. (5)]

Ruegg, K.C., and *Chester Jones*, for the applicant. The employers had the use of part of the dock as pointed out in *Raine* v. *Jobson* (3), and it is immaterial whether they were at

(1) [1901] 1 K. B. 700.
(2) [1901] 1 K. B. 35.
(3) [1901] A. C. 404.
(4) [1900] 1 Q. B. 478.
(5) (1900) 2 F. 722; sub nom. *Abernethy* v. *Low*, 37 S. L. R. 506.

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work upon a ship or elsewhere in the dock. The argument as to the Act contemplating one occupier of the premises and one only was used before the House of Lords in that case, but without effect. The Scottish cases must stand or fall together, and one of them, *Aberdeen Steam Trawling and Fishing Co.* v. *Peters* (1), was cited in *Raine* v. *Jobson* (2), and the decision shews that it was not approved. There is no necessity for exclusive possession. All that is necessary is that the employers should have, as in this case, a possession sufficient for the purposes of their contract. The argument that there must be exclusive possession was rejected by this Court in *Merrill* v. *Wilson.* (3) If the contractors had not the actual use and occupation of a part of the dock, the occupation must have been in the dock company; and that conclusion is negatived by the decision in the last-mentioned case.

A. Powell, in reply.

COLLINS M.R. I am of opinion that this appeal should be dismissed. The learned county court judge found that the applicant was entitled to an award, and he arrived at that result by coming to conclusions of fact, that the man was injured in a factory, and that the respondents were undertakers within the meaning of the Workmen's Compensation Act. It is said that the award cannot stand on one or other of two grounds—either that there is no evidence to support the finding that the respondents were occupiers of a factory, and as such were undertakers, or that the judge arrived at his conclusion by misdirecting himself in point of law. On the question of fact, if there is evidence that the place in which the man met with the accident can be described as a factory and the defendants were in use or occupation of it, the finding cannot be disturbed. The facts are that a transport was being made ready for a voyage, and that W. Gray & Co. were doing painting and plumbing work, and one of the partners stated that they were contractors for that work, and were in possession of the ship so far as was necessary for the work that they had

(1) (1899) 1 F. 786. (2) [1901] A. C. 404.
(3) [1901] 1 K. B. 35.

contracted to do. That, to my mind, points to a contract on a large scale for doing all the work necessary to complete the outfit of the transport in this respect. The workman who was injured was employed in painting the booby-hatch, and there is no evidence that the employers' contract was confined to that. The evidence is that it was a general contract, a part of which was the painting of the booby-hatch. The ship was lying in a dock, and was therefore occupying part of a factory, and the person in possession of the ship would come within the description of a person having the actual use or occupation of a dock or of premises forming part thereof. Sect. 23 of the Factory and Workshop Act, 1895, contains a provision that for the purpose of the enforcement of certain enumerated sections of the Factory and Workshop Act, 1878, the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, shall be deemed to be the occupier of a factory. This provision of the Factory and Workshop Act, 1895, is swept in by the Workmen's Compensation Act, 1897, s. 7, sub-s. 2, to define what is a factory within that Act and who are undertakers. When we are dealing with a dock we must look at that sub-section to see whether the place is brought within the description of a factory and to discover who are undertakers.

From the decision of the House of Lords in *Raine* v. *Jobson* (1) it is clear that persons repairing a ship in a dock are occupiers of a factory. The case of *Flowers* v. *Chambers* (2) to the contrary effect was overruled. We come then to this: Were the respondents undertakers, or must the learned judge have misdirected himself that they were? It seems to me that no one can carry on an operation on a ship floating in a dock without having the use of the dock, and that when you have persons who have taken such a contract and are engaged in carrying it out, they have the use of that area of the dock for the purpose of their work, and are undertakers. It was contended that there cannot be use or occupation within the Act unless it is exclusive; but it has been pointed out that

(1) [1901] A. C. 404. (2) [1899] 2 Q. B. 142.

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that argument was put to this Court in *Merrill* v. *Wilson* (1) and overruled. As was shewn in that case, where the Court is dealing with user the nature of the subject-matter of the user must be looked at, and the use or occupation of a wharf may be very different from the use or occupation of some other subject-matter. Further, the use or occupation of any given thing may well be subject to the use of the same thing by some one else, provided that the two do not conflict. That consideration cuts the ground from under the argument that the occupation of the person sought to be charged as undertaker must be exclusive. In considering what is a factory some conception of a possible limit of space must no doubt of necessity be imported. Where a whole ship is handed over to contractors for certain purposes, that fact is not inconsistent with the use of the ship by some one else for other purposes not interfering with the purpose for which the ship was handed over. In this case, therefore, the applicant is brought within the category of persons working in a factory in the employment of the undertakers, or at the least there was evidence which justified the learned county court judge in holding that the applicant was within that category, and there was no misdirection involved in so doing. So to treat persons in the position of the applicant avoids the anomaly which would otherwise arise, if a workman employed directly by the shipowner were within the Act, but one employed not by the shipowner but by a person undertaking the whole contract to do what was necessary to the ship were outside the Act, and without remedy if he should sustain injury. Nothing but extreme refinement of reasoning would let in one class and exclude the other.

I think that the right to compensation was fully established in this case, and that the appeal fails.

STIRLING L.J. There are two questions to be considered in this case: first, whether a ship in a dock is to be considered to be a factory within the meaning of the Workmen's Compensation Act; and, second, whether the respondents in this case were undertakers within the meaning of the Act.

(1) [1901] 1 K. B. 35.

As to the first point, having regard to the decision in *Raine* v. *Jobson* (1), I confess I do not feel any difficulty. The ship was lying in a dock, and a dock is obviously within the Act. It was pointed out by the Lord Chancellor in that case that the Workmen's Compensation Act does not deal with the relation between shipowners and sailors in their ordinary occupation; but he also pointed out that it does not follow that because a ship is brought into a dock, and work is there done upon it, the immunity of the ship from the operation of the Act when on the seas is extended to it, while in the dock. Where the ship is in a dock, the liabilities imposed by the Act attach to it. It is not necessary that the shipowner should be in exclusive possession of the ship, because, as has been pointed out, it is sufficient that there should be definite premises in the dock of which the person charged is in possession. The ship, therefore, in this case is brought within the definition of a factory.

As to the second point I confess I had at first considerable difficulty, and I was impressed by the argument addressed to us on behalf of the employers. But after all it comes to this: Was there evidence on which the learned county court judge could properly find that the employers had the actual use of a portion of the dock within the meaning of the Act? They were doing the painting and plumbing which was required on the ship preparatory to her being sent on a voyage. They had contracted to do that work, and sent their workmen to do it. It was stated in evidence by one of the firm that they had possession of the ship as far as was necessary for the work that was to be done, and all that appears on the evidence as to occupation by others is that the owners of the ship had control for other purposes by means of the sailors who were on board. In these circumstances it was open to the learned judge to find that the employers had such an occupation of the ship as constituted them undertakers within the meaning of the Act.

MATHEW L.J. This ship, lying in a dock, occupied part of a dock, and on the authorities it came within the definition of

(1) [1901] A. C. 404.

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a factory. I am further of opinion that there was evidence which justified the learned judge in holding that the use of the ship had been handed over to the firm for the purpose of the contract. It is said to be clear that exclusive occupation is that which is meant by the Act, and that there was not exclusive occupation by the employers because the ship was in the possession of the owners in the ordinary way, but I cannot agree with this contention. The case was put during the argument of a chartered ship handed over to stevedores for the purpose of unloading and discharging cargo, and it was asked if the stevedores could be described as being in occupation. The answer given was, that the case put by way of illustration was not this case; but the illustration seems to me to shew that there can be independent occupation of a ship, such as that by the stevedores in the case put, while the owner is on board and has control for other purposes. We have to construe an Act of Parliament, and must assume that the Legislature knew of the ordinary user to which a ship is put. A ship is a freight-earning machine, and for the purpose of enabling her to earn freight it is indispensable that the owner should enter into contracts at different times for the purpose of keeping her in proper condition. Those contracts are ancillary to the purpose of the ship earning freight, and the shipowner would not be liable to the workman in a case like the present. Is no one to be liable? It is said that all workmen employed on such contracts for repairs have no rights under the Act. I cannot see why it should be held that the Legislature intended that workmen employed in such a case were to be disentitled to compensation in case of injury. It would require very clear language in the Act to shew that intention. I am satisfied that the argument is unsound, and I agree with my learned brethren that the respondents were undertakers within the description given by the Act, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for applicant: *Shaen, Roscoe, Massey & Co.*
Solicitors for employers: *William Hurd & Son.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 18.

THOMPSON *v.* THE CITY GLASS BOTTLE COMPANY.

Employer and Workman—Injury to Workman—Defect in Condition of Machinery—Machine no longer in Use—"Machinery or Plant connected with or used in the Business of the Employer"—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.

A machine used in the defendants' business broke down, and the foreman directed that it should be removed from the position in which it had been placed while in use. The plaintiff, who was a workman in the employment of the defendants, assisted in removing the machine, and was injured while doing so by reason of a defect in the machine which was within the knowledge of the foreman. In an action under the Employers' Liability Act, 1880:—

Held, that the fact that the machine at the time of the accident had broken down, and was no longer in use, did not necessarily shew that it had ceased to be "machinery or plant connected with or used in the business of the employer" within the meaning of s. 1, sub-s. 1, of the Act.

Judgment of the King's Bench Division, [1901] 2 K. B. 483, reversed.

APPEAL from the judgment of the King's Bench Division, reported [1901] 2 K. B. 483, on appeal from a judgment of the judge of the Bow County Court.

The action was brought under the Employers' Liability Act, 1880, to recover damages for injuries sustained by the plaintiff owing to the defective condition of a machine upon the defendants' premises.

The plaintiff, who was a stoker in the employment of the defendants, was allowed (with other workmen) in the intervals of stoking to use the machine for the purpose of making glass stoppers for bottles, for which work he received extra pay. When the machine was to be used it was removed from the place where it was kept and put in position near the furnaces. On Saturday, November 24, 1900, while the machine was in position near the furnace, the arm was broken off and the foreman told the workmen that it was not to be used again, and that a new machine had been ordered. On the following day, Sunday, the plaintiff and two other men were engaged

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under the orders of the foreman in removing the machine, from the place where it stood when it broke down, to a position in a corner of the works. While they were doing this the lever, which weighed 2 cwt., fell on the plaintiff's toe, the fall being in consequence of the pin having been broken. The county court judge was of opinion that the machine, although it had finally ceased to be used in the defendants' business at the time of the accident, was "plant" within the meaning of s. 1, sub-s. 1, of the Act, and gave judgment for the plaintiff.

The defendants appealed to the King's Bench Division, and the appeal was allowed. (1)

The plaintiff appealed.

Austin Metcalfe, for the plaintiff. If the machine had been broken up and put on one side, or even if it had been put into a yard out of the way, it might have lost its character of plant, but it cannot have changed its character directly it was decided that it should not be used again. It was in the position in which it had been used, and it was necessary for the carrying on of the defendants' business that it should be removed, and until it was finally put out of the way it could be properly treated as plant. If it was not plant it would be difficult to find any description for it.

W. Addington Willis, for the defendants. The question is, what was the condition of the machine at the time of the accident? It was worthless and past repair and a derelict. Sect. 1, sub-s. 1, of the Act applies only to machinery actually being used, or capable of being used, and as to such a machine there is a duty to keep it in proper condition. No such duty attaches to a machine that cannot be used in the master's business. *Howe* v. *Finch* (2) shews that there must be a time at which machinery comes into user and so becomes plant, and the converse must be true that there must be a time at which it ceases to be plant. *Yarmouth* v. *France* (3) shews that the test to be applied is whether the subject-matter of the inquiry is kept for permanent employment in the business. If there

(1) [1901] 2 K. B. 483. (2) (1886) 17 Q. B. D. 187.
(3) (1887) 19 Q. B. D. 647.

was no duty to keep this machine in proper condition there was no negligence on the part of the foreman.

COLLINS M.R. I am of opinion that this appeal should be allowed. With the greatest respect for the judgments of the learned judges who decided the case in the King's Bench Division, it seems to me that on the facts appearing in the judge's notes there was evidence on which he could come to the conclusion at which he arrived. In the first place he decided that the machine was, though in a defective condition, plant connected with or used in the employers' business, and in the next place that it was defective to the knowledge of the foreman when he gave the order for its removal. On the question whether there was any evidence on which the judge could find that the machine was plant, we have the fact that it was in such physical contiguity to the rest of the plant that it had to be removed out of the way under the orders of the foreman. There was no evidence so far as I can see of an absence of intention to mend the machine, and it could not be contended that the mere fact of its being out of repair caused it to cease to be plant. The words of the section "used in the business of the employer" do not in my opinion mean that the plant must be in use at the moment when the injury occurs to the workman, and a machine does not cease to be plant in the interval between the giving an order that it shall be repaired and the completion of the repair. I think, therefore, there was evidence on which the county court judge could find for the plaintiff on this point.

As to the second point arising on the question of the negligence of the foreman which was not dealt with in the judgment of the Court below, I think there was plenty of evidence on which the county court judge could find as he did. It is plain from the notes that the foreman knew of the defects of the machine and was present while it was being removed on his order.

STIRLING L.J. There are two questions in this case: first, whether this machine was "machinery or plant connected with

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or used in the business of the employer"; and the second, whether it was defective to the knowledge of the defendants' foreman. On the first point the evidence seems to shew that the machine had ceased to be used in the business; but the question arises whether it had ceased to be connected with the business. The position of affairs was that in the ordinary course of business the machine was taken from the place where it generally stood when not in use and was put where it could be used. It is conceded that it was necessary to move it back before the business of the manufactory could proceed. With all respect for the judgment of the learned judges in the Court below, I do not feel justified in saying that there was no evidence that the machine was not, when the accident occurred, machinery or plant connected with the business. I think there was evidence before the learned county court judge on which he could find that the machine had not lost its character of plant within the meaning of the Act.

The Court below did not deal with the other point as to negligence, as to which I need only say that I agree with the Master of the Rolls.

MATHEW L.J. I am of the same opinion on both points.

Appeal allowed.

Solicitor for plaintiff: *C. M. Treadwell.*

Solicitor for defendants: *F. A. S. Stern.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 9.

WILLMOTT *v.* PATON.

Employer and Workman—Compensation—Factory—Machine worked by Hand-power—Warehouse—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 93—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Premises in which machinery is set in motion and kept in motion by hand-power only are not premises wherein "mechanical power" is used within the meaning of s. 93 of the Factory and Workshop Act, 1878, and the use of such machinery does not constitute the premises a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897.

A warehouse may be a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, although it is not part of, or adjacent to, a dock, wharf, or quay, and is not contiguous to water.

APPEAL from a decision of the judge of the Pontypool County Court upon an application under the Workmen's Compensation Act, 1897.

At the hearing in the county court no evidence was called on either side, but certain statements of fact were orally made and accepted as correct; no note was taken by the judge, he having been informed that it was not necessary. From the statements made at the hearing, as supplemented by those made on the appeal, it appeared that the applicants were the dependants of a workman in the employ of the respondent, who had been killed upon the respondent's premises by an accident arising out of and in the course of his employment. The respondent was the occupier of a large yard or depot, with sheds upon it; the premises, which were five acres in extent, were used for the purpose of storing old iron and breaking it up for sale. The iron was brought to the premises in railway trucks, and many thousands of tons, worth from 4000*l.* to 5000*l.*, were frequently on the premises at one time. The only machinery used in the yard was a travelling crane, on which was a heavy weight of about three or four tons, which was raised and allowed to fall on the iron to be broken; this machine was set in motion and kept in motion by hand-power. The deceased man was killed while trying to stop a truck upon a tramway

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line in the yard by inserting a crowbar between the spokes of the wheel. The premises of the respondent did not form part of, and were not connected with, any dock, wharf, or quay, nor were they in fact adjacent or contiguous to water.

There being no judge's note, the learned county court judge gave a certificate for the purpose of the appeal, of which the following is the material part: "It was contended on behalf of the respondent that the premises in which Thomas Willmott was working when he was injured were not a "factory" within the meaning of s. 7 of the Workmen's Compensation Act, 1897, for the following reasons: (1.) That the words 'or other mechanical power' in s. 93, sub-s. 3 (*c*), of the Factory and Workshop Act, 1878, are to be construed as words ejusdem generis with the words 'steam, water,' immediately going before. I held that this was not so upon the ground that neither steam nor water is a mechanical power in itself, though each may be applied to create mechanical power, and that the rule of construction relied upon did not therefore apply. I also held that the crane in question, although the handle was turned by hand, was a mechanical power, as the power applied to the handle is very greatly increased by the machinery of the crane. I held that the respondent's premises were a factory. (2.) That the respondent's premises were not a 'warehouse' within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897. I held as a fact that they were a warehouse, and that the provisions of s. 23 of the Factory and Workshop Act, 1895, applied to them." The learned judge awarded 160*l.* compensation to the applicants, and the employer appealed.

Ruegg, K.C., and *Albert Parsons*, for the employer. The decision of the county court judge was wrong on both points. First, the premises were not a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, for they were not a "non-textile factory" within the definition contained in s. 93 of the Factory and Workshop Act, 1878. The test of whether a place is a non-textile factory is whether the machinery employed is driven by steam, water, "or other mechanical power," and in the present case the machinery was

moved by hand-power only, not by mechanical power at all. In *Wrigley* v. *Bagley* (1) it was contended that pulleys worked by a hand-winch were worked by the mechanical power of the winch, although the winch itself was turned by hand; but no formal judgment was given on the point, which was, in fact, abandoned during the argument.

[COLLINS M.R. That case is decisive of this point.]

Secondly, the premises were not a "warehouse" within the meaning of s. 7. Every store-room cannot be a warehouse, and some limitation must be placed upon the meaning of the word. The proper limitation is suggested by the collocation of the words "dock, wharf, quay, warehouse," and to satisfy the section a warehouse must be ejusdem generis with a dock, wharf, or quay; in other words, it must be contiguous to water, as a warehouse at a dock, wharf, or quay would be.

[COLLINS M.R. The question is whether there was any evidence that these premises were a warehouse, and our difficulty is that there is no evidence before us.]

The word must be construed in its ordinary popular sense, as was done with the word "wharf" in *Haddock* v. *Humphrey* (2); in the popular sense, these premises are not a warehouse.

Clavell Salter and *Minton Senhouse*, for the applicants, were not called upon.

COLLINS M.R. This appeal comes before us in a very unsatisfactory way. At the hearing in the county court two points were raised, but no evidence was called, and the decision of the county court judge proceeded on an agreed statement of facts, which was not in writing, but was assented to verbally by or on behalf of the parties. The accident to the deceased was caused by his endeavouring to stop a trolley by putting a crowbar in between the wheels so as to prevent its running into a horse, and it happened close to a place where a large quantity of iron was stored. The mechanical power relied upon to bring the premises within the definition of "factory" was a travelling crane, in fact worked by hand-power, by which a weight of several tons was raised to the required

(1) [1901] 1 K. B. 780. (2) [1900] 1 Q. B. 609.

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Collins M.R.

height, and, when released, fell upon and broke the iron placed beneath it. The statement of facts is very meagre, and there seems to be nothing material beyond what I have stated.

The first contention on behalf of the applicants was that the premises were a factory by reason of the definition which constitutes premises a factory where machinery driven by steam, water, or other mechanical power is used. It was said, and the county court judge so held, that the machinery in this case was driven by mechanical power, although it was in fact kept in motion by hand-power, and that it was not necessary that the "other mechanical power" contemplated by s. 93 of the Factory and Workshop Act, 1878, should be ejusdem generis with steam-power or water-power. With that part of the judgment of the county court judge I cannot agree; the point has been decided adversely to the contention of the applicants in *Wrigley* v. *Bagley*. (1) It is true that the head-note to that case does not embrace that part of the decision; but it is clear from a perusal of the argument and of my judgment in that case that the point was overruled and abandoned in the course of the argument. On that point, therefore, I think that the county court judge was wrong; that, however, is not sufficient to enable the employer to succeed.

The next point argued was whether the premises were a warehouse within the meaning of the section. It is unnecessary for us to go through the cumbrous process of shewing how a warehouse becomes a factory within the meaning of the Act; it is sufficient to say that a warehouse is a factory. Were these premises, then, a warehouse? If they were, it is not necessary that machinery worked by steam, water, or other mechanical power should be upon them. I think that, this being a point of law, and no evidence having been given at the trial, we may well complain of the unfairness of asking us to decide the point without facts. But it is for the employer, who is appealing, to supplement this want of evidence, and, on the facts which have been admitted before us, it is clear that these premises might be a warehouse. It is admitted that they were used for the purpose of breaking up old iron by means of a machine which

(1) [1901] 1 K. B. 780.

raised and let fall a weight of several tons, and that a quantity of old iron, amounting to several thousand tons, was stored there. The premises were also used for the purpose of selling the iron and for its inspection by buyers, and the iron was undoubtedly kept and stored there. It is impossible to say on those facts only that these premises might not be a warehouse. Then it is said that they cannot be a warehouse because they are not in contiguity to a dock, wharf, or quay, the contention being that, because the leading idea of the section is contained in those words, the warehouse contemplated by the section must be in contiguity to a dock, wharf, or quay. I do not think, however, that there is anything in the Act which debars us from holding that something may be a warehouse which is not in contiguity with a dock, wharf, or quay; and I think therefore that this appeal should be dismissed.

STIRLING L.J. I am of the same opinion on both points. As to the first point, if the view of the county court judge was that suggested, it is much wider than any that has yet been adopted. For if the use of any instrument worked by hand-power constitutes the premises a place where machinery is worked by steam, water, or other mechanical power, then every place in which a pulley or a crowbar is used to impart motion falls within the definition. I do not think that the expression "mechanical power" is fairly capable of such an extended meaning. On the other point, the only question is whether the word "warehouse" is to receive its ordinary meaning or not, and the only ground on which it is suggested that that meaning should be cut down is because in the section it is used in juxta-position with the words "dock, wharf, quay." From this it is contended that a warehouse, in order to come within the section, must be contiguous to water, and must be a place ejusdem generis with a dock, wharf, or quay. This is, in my opinion, far too restricted a meaning to place upon the word, and on this point I think that the county court judge was right.

MATHEW L.J. I wish to add nothing upon the first point, which was disposed of by this Court in *Wrigley* v. *Bagley*. (1)

(1) [1901] 1 K. B. 780.

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On the second point, no doubt certain facts must be assumed to have existed that would justify the finding that these premises were a warehouse. It was, however, admitted that if these sheds had been close to a wharf they would have been a warehouse, and in my opinion the distinction founded on the contiguity of the premises to water is one which it was never intended to draw in this Act of Parliament. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for employer: *W. Hurd & Son, for L. E. Webb, Pontypool.*

Solicitors for applicants: *Le Brasseur & Oakley, for Le Brasseur & Owen, Pontypool.*

W. J. B.

C. A. 1901 *Nov.* 27; *Dec.* 3, 9.

[IN THE COURT OF APPEAL.]

GORDON *v.* LONDON, CITY AND MIDLAND BANK, LIMITED.

GORDON *v.* CAPITAL AND COUNTIES BANK, LIMITED.

Banker—Cheque—Conversion—Crossed Cheque paid in to Customer's Account—Forged Indorsement—Credit given to Customer before Cheque cleared—Receipt of Payment by Banker—Banker not acting merely as Agent for Collection — Cheque crossed by the Collecting Banker — Draft by one Branch of Bank on another — Crossed Cheque paid in to Account of Customer of Bank on which Cheque is drawn — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 3, *sub-s.* 1; *ss.* 60, 73; *s.* 77, *sub-s.* 6; *s.* 79, *sub-s.* 2; *ss.* 80, 82—*Revenue Act*, 1883 (46 & 47 *Vict. c.* 55), *s.* 17.

Bankers are entitled to the protection given by s. 82 of the Bills of Exchange Act, 1882, only in cases where they receive payment of a crossed cheque as agents for collection for a customer. They are not entitled to that protection where they receive the cheque under such circumstances as to constitute them holders of it on their own account. Therefore, where bankers credit a customer with the amounts of cheques as soon as they are paid in to his account, and allow him to draw against the amounts so credited before the cheques are cleared, they are not entitled to the protection given by s. 82.

The above-mentioned section only applies to cheques which are crossed

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before they come into the bankers' possession, and the bankers cannot by afterwards crossing the cheque themselves become entitled to the protection given by the section.

A banker's draft addressed by one branch of a bank to another branch of the same bank is not a cheque within the meaning of ss. 60, 82 of the Bills of Exchange Act, 1882; nor is it within s. 17 of the Revenue Act, 1883.

Cheques drawn upon a branch of the defendants' bank by customers of the defendants, payable to the order of the plaintiff, and crossed, were stolen from the plaintiff by a clerk in his employ, who had an account with another branch of the defendants' bank. The clerk forged the plaintiff's indorsement on the cheques, and paid them in to his own account. The cheques were collected by the ordinary book-keeping process of debit and credit at the defendants' head office, and their amounts were placed to the credit of the clerk, who drew cheques against the same which were duly paid. The defendants so dealt with the stolen cheques in good faith and in the ordinary course of business. In an action by the plaintiff against the defendants for conversion of the cheques :—

Held, that the defendants were, notwithstanding the provisions of s. 79, sub-s. 2, of the Bills of Exchange Act, 1882, protected from liability to the plaintiff in respect of the cheques by the provisions of s. 60 of that Act.

APPEAL of the plaintiff against the judgment of Bucknill J. in two actions tried before the learned judge with a jury. (1)

Both the actions were for damages for the wrongful conversion by the defendants of cheques belonging to the plaintiff, and, in the alternative, for money received by the defendants for the plaintiff's use.

The defendants in both actions, while denying liability, made a payment into court of a portion of the amount claimed.

At the trial of the first action the facts appeared to be as follows. The plaintiff, who carried on business at Birmingham under the style of Gordon & Munro, had employed one Jones for about ten years as a ledger clerk. It was Jones's duty to take the business letters from the letter-box daily, and place them on the plaintiff's desk. When customers remitted cheques to the plaintiff, it was his practice to enter the same in his cash-book, and pay them into his bank; but, when he was absent from business, Jones was authorized to open the

(1) In both cases there was also an application for a new trial on the ground that the verdict of the jury was against the weight of the evidence. The statement of facts in the text only states the effect of the evidence so far as material to the points of law involved.

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letters, and to put all cheques and remittances on one side to await the plaintiff's return. Jones had no authority to indorse cheques in the plaintiff's name, or to deal with them in any way. Jones carried on a small business on his own account, and had an account at the Sparkbrook branch of the defendants' bank. Between August, 1895, and February, 1899, Jones on various occasions stole from letters, which had been delivered through the post at the plaintiff's office, a number of cheques (1), indorsed with the name of the plaintiff's firm such of them as were drawn to order, and paid them in to his own account at the defendants' Sparkbrook branch, which subsequently presented and received the amounts of the cheques. The cheques or instruments so paid in consisted of six classes, which were as follows: (1.) Cheques which were drawn on banks other than the defendants' bank, payable to the order of the plaintiff's firm, and which, when received by the defendants, were not crossed. (2.) One cheque payable to bearer, drawn on a bank other than the defendants' bank, and not crossed when received by the defendants. (3.) Bankers' drafts, addressed to the defendants' head office in London, signed by one Henn, the manager of the defendants' Leamington branch, as such manager, requiring the head office to pay on demand on account of the branch a sum of money to the order of the plaintiff's firm, which drafts were not crossed when received by the defendants. (4.) Cheques drawn on branches of the defendants' bank other than the Sparkbrook branch, payable to order of the plaintiff's firm, and crossed before the defendants received them. (5.) Cheques drawn on banks other than the defendants' bank, payable to the order of the plaintiff's firm, marked "not negotiable," and crossed before the defendants received them. (6.) Cheques drawn on banks other than the defendants' bank, payable to the order of the plaintiff's firm, and crossed before they were received by the defendants. This class included the bulk of the cheques in respect of which the action was brought. (7.) Cheques drawn payable to bearer on banks other than the defendants' bank, and crossed before they

(1) As will be seen later some of the instruments stolen were not "cheques" in the strict legal sense.

were received by the defendants. (8.) Orders addressed to a bank other than the defendants' bank for payment of money to the plaintiff's firm conditional on the signature and presentation of a subjoined receipt for the same, and crossed when received by the defendants.

From July, 1895, until November, 1897, the account of Jones with the defendants' bank was in credit. From November, 1897, till February, 1899, it was from time to time overdrawn. There was apparently no special arrangement between the defendants and Jones as to the amount of overdraft which should be permitted, but it appeared to have been a matter in the discretion of the manager of the defendants' Sparkbrook branch. From November, 1897, down to March, 1899, when his practices were detected, Jones's account would constantly have been overdrawn but for credits in respect of cheques paid in as aforesaid. The practice of the defendants with regard to all cheques paid in by Jones was as follows. When he brought the cheques to the bank with the forged indorsement of the plaintiff's firm thereon, he added also his own name. There was no direct evidence as to how he came to do this, the cashiers who received the cheques not being called; but the manager of the defendants' Sparkbrook branch, who was called, admitted that possibly the cashiers receiving the cheques might have asked Jones to indorse them, and that, if he had not indorsed his name, he would have been required to do so, in order that the bank might have the security of his name. As soon as the cheques were received by the defendants the amounts of them were placed to Jones's credit, and at the same time the defendants crossed the cheques, whether they were crossed before or not, by stamping them with a rubber stamp, "The London, City and Midland Bank, Limited, Sparkbrook, Birmingham, to Head Office, London." This was done as a precaution against dishonesty, the effect being to make the cheques payable to or through the head office only. The cheques which were drawn on the defendants' own bank were collected by the ordinary book-keeping process of debit and credit at the defendants' head office, and the amounts of them placed to the credit of the Sparkbrook branch.

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The second action was brought in respect of cheques which had been stolen and paid into a branch of the defendants' bank by Jones, who had an account there, under circumstances similar to those which existed in the case of the first action. The cheques in respect of which the second action was brought were, with two exceptions, like those in class 6, above mentioned—that is to say, cheques drawn on banks other than the defendants' bank payable to order of the plaintiff's firm, crossed before they were received by the defendants, and the indorsement on which by the plaintiff's firm was forged by Jones. The only difference between the two cases was that some of the cheques in the second action were not indorsed by Jones with his own name. In this case also, as in the first case, Jones appeared to have been credited with the amounts of the cheques as soon as they were paid in, and allowed to draw against the amounts so credited before the cheques were cleared.

It was admitted on the part of the plaintiff that the defendants in each case had acted in good faith, and the jury gave an answer in each case to a question put to them by the learned judge which amounted to a finding that the defendants had not been guilty of negligence in taking the cheques. All other questions in the actions were by agreement left to the judge for decision with power to draw inferences of fact from the evidence given. The learned judge held that the defendants had in each case received the cheques as agents of Jones for collection.

With regard to the cheques which were the subject of the first action, the learned judge held as follows: With regard to class 1, he held that the defendants were liable on the ground that the cheques were not crossed cheques within s. 82 of the Bills of Exchange Act, 1882. With regard to class 2 also he held that the defendants were liable, although the cheque was payable to bearer, on the ground that the defendants did not take the cheque as holders on their own account, but as agents for Jones. With regard to class 3, he held that the defendants were protected from liability by s. 60 of the Bills of Exchange Act, 1882. With regard to class 4,

the learned judge held that the defendants were protected from liability by ss. 60 and 82 of the Bills of Exchange Act, 1882. With regard to classes 5, 6, and 7, he held that the defendants were protected from liability by s. 82 of the Bills of Exchange Act, 1882. With regard to class 8, he held that the defendants were protected from liability by the combined effect of s. 82 of the Bills of Exchange Act, 1882, and s. 17 of the Revenue Act, 1883. Having regard to the amount paid into court by the defendants, the learned judge held that they were entitled to judgment in the action.

The plaintiff appealed against the judgment as to classes 3 to 8 of the cheques. The defendants gave notice of cross-appeal as to classes 1 and 2.

With regard to the cheques which were the subject of the second action, the learned judge held that the defendants were, except as to two of them, protected from liability by s. 82 of the Bills of Exchange Act, 1882, and that, having regard to the amount paid into court, they were therefore entitled to judgment.

The plaintiff appealed from that judgment. (1)

A. T. Lawrence, *K.C.*, and *J. Leslie*, for the plaintiff. The main question relates to class 6 of the cheques in respect of which the first action was brought, and to the cheques in respect of which the second action was brought, which are of a similar character, the only difference being that, in the case of some of these latter cheques, Jones did not indorse the cheques, when he paid them in to his account. The question with regard to all these cheques is whether the defendants are protected from liability by s. 82 of the Bills of Exchange Act, 1882. It is submitted that they are not so protected. That section only applies to cases where the banker receives the cheque merely as agent of a customer for collection. If the

(1) By the Bills of Exchange Act, 1882, s. 82, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

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banker takes the cheque as holder on his own account, then he is not protected by the section: *Matthiessen* v. *London and County Bank.* (1) The effect of what took place here is that the defendants did not take the cheques merely as agents for collection, but the transaction in each case amounted to a negotiation of the cheque. In the case of the cheques which Jones indorsed with his own name, it is clear that the defendant banks took those cheques as holders on their own account. It cannot possibly be said that Jones's indorsement was necessary to enable the bank to collect the amount of the cheque, or was in any way ancillary to the process of collection. It was important for the defendants to get Jones's indorsement, if they were taking the cheques as holders for value, for, by s. 55 of the Bills of Exchange Act, 1882, it operated as a warranty by him of the genuineness of the previous signatures on the cheque, and of the validity of the cheque, and his title thereto. It has been held that, where a bank gives immediate credit for the amount of a cheque paid in as these were, the bank becomes holder for value of the cheque, even although the customer's account is not overdrawn: see *Ex parte Richdale* (2); *Royal Bank of Scotland* v. *Tottenham* (3); *M'Lean* v. *Clydesdale Banking Co.* (4); *National Bank* v. *Silke* (5); *Bissell & Co.* v. *Fox Brothers & Co.* (6) In *Great Western Ry. Co.* v. *London and County Banking Co.* (7) the decision of the House of Lords turned mainly, no doubt, on the point that the person from whom the defendants received the cheque was not a customer, but it is clear from many passages of the judgments that the learned Lords who decided that case were of opinion that s. 82 only applies where the banker has acted merely as the customer's agent for collection, and, if the banker obtains any rights on the cheque on his own account, or does anything which goes beyond mere collection, he is not protected by the section. The action of Jones in indorsing and the bank in taking his indorsement on the cheques amounted to a

(1) (1879) 5 C. P. D. 7.
(2) (1882) 19 Ch. D. 409.
(3) [1894] 2 Q. B. 715.
(4) (1883) 9 App. Cas. 95.
(5) [1891] 1 Q. B. 435.
(6) (1884) 51 L. T. 663; (1885) 53 L. T. 193.
(7) [1900] 2 Q. B. 464; [1901] A. C. 414.

conversion of the cheques at common law, in respect of which the bank is not protected by the terms of s. 82. It was action by which Jones affected to pass, and the defendants to take from him, the property in the cheque. That was a conversion antecedent to, and quite independent of, the receipt of the amounts of the cheques, which conversion was entirely outside s. 82. Again, the defendants stamped the cheques with their own stamp, which was an act amounting to conversion of them, and which was not necessary for collection. It was said for the defendants that they received and dealt with these cheques in the ordinary course of business, it being the practice of country banks to credit the amount of a cheque paid in to a customer's account at once, debiting the customer again with the amount, if the cheque is not honoured; and that s. 82 was meant to protect bankers who merely deal with such cheques as these in the ordinary course of business. But it is to be observed that s. 82 says nothing about the course of business, differing in that respect from s. 60, which protects bankers on whom a cheque is drawn, and who pay the cheque in good faith and in the ordinary course of business, from liability in case the indorsement of the cheque is forged or made without authority. The defendants' contention appears to be that any act of conversion prior to the receipt of payment of the cheque is justified if the bank subsequently receive payment. The effect of that contention is really to strike the words "by reason only of having received such payment" out of s. 82.

The cheques included in class 1 of the cheques, which were the subject of the first action, were not crossed when the defendant bank received them. Those cheques, when received, were not within s. 82, and the bank cannot by crossing them afterwards bring them within it: *Bissell & Co.* v. *Fox Brothers & Co.* (1) With regard to the cheques payable to bearer included in classes 2 and 7, it must be admitted that, if the plaintiff's contention on the main question is correct, and the defendants took those cheques as holders for value, the plaintiff cannot succeed as to them. On the other hand, if the learned

(1) 51 L. T. 663; 53 L. T. 193.

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judge was right in holding that the defendants acted as agents for collection only with regard to all the cheques, then the plaintiff would be entitled to succeed as to the cheque included in class 2. Class 3 consists of drafts drawn by the defendants' bank through Henn, the manager of their Leamington branch, on their head office. These drafts are not cheques within the Bills of Exchange Act, 1882, and therefore the defendants are not protected with regard to them either under s. 60 or s. 82 of the Act. A cheque is defined by s. 73 of the Act to be a bill of exchange drawn upon a banker payable on demand. The definition of a bill of exchange, which is given by s. 3, sub-s. 1, involves that it should be an order addressed by one person to another. These drafts were not so addressed. The two branches of the defendant bank cannot be considered as different persons for this purpose, though for some purposes they may no doubt be so considered: *Garnett* v. *McKewan* (1); *Prince* v. *Oriental Bank Corporation*. (2) It is impossible to suppose that Henn was intended to be the drawer of these instruments in his personal capacity. These instruments are not within s. 17 of the Revenue Act, 1883, because they were not issued by a customer of the bank, but by the bank to a customer: see definition of "issue" in s. 2 of the Bills of Exchange Act, 1882. Class 4 consists of crossed cheques drawn upon branches of the defendants' bank other than the Sparkbrook branch. The defendants are not protected in respect of these cheques by the Bills of Exchange Act, 1882. These crossed cheques were not paid to a banker within the meaning of s. 79, sub-s. 2, of the Act; for the defendants did not and could not pay the cheques to themselves. They merely made certain entries in their books, whereby their Sparkbrook branch was credited with the amounts of the cheques, and Jones got credit with that branch for their amounts; and the only payment was really to Jones on the cheques which he drew against those credits. Sect. 79, sub-s. 2, of the Bills of Exchange Act, 1882, prohibits payment of crossed cheques otherwise than to a banker. These cheques were not so paid, and therefore the defendants have not satisfied the requirements

(1) (1872) L. R. 8 Ex. 10. (2) (1878) 3 App. Cas. 325.

of that sub-section; and they are not protected by s. 60. Sect. 73, which defines a cheque, provides that "except as otherwise provided in this Part the provisions of this Act applicable to a bill of exchange payable on demand, apply to a cheque." That provision excludes crossed cheques from the operation of s. 60, such cheques being otherwise provided for by ss. 79 and 80. If s. 79, sub-s. 2, is not complied with, the defendants are not protected by s. 80. Class 5 of the cheques, which were the subject of the first action, stands on the same footing as class 6. The fact that the cheques in this class were marked "not negotiable" does not really differentiate them in principle from the cheques in class 6. That fact, on the contrary, is an additional fact tending to shew that, when the defendants took those cheques with Jones's indorsement on them, they were not acting merely as agents for collection and were not within s. 82. Having regard to what Lord Brampton said in *Great Western Ry. Co.* v. *London and County Banking Co.* (1), it may be doubted whether bankers who take cheques marked "not negotiable" as the defendants did from Jones are not necessarily guilty of negligence in so doing. Class 8 consists of instruments which were not negotiable, because they were not unconditional orders for the payment of money; but s. 17 of the Revenue Act, 1883 (46 & 47 Vict. c. 55), no doubt makes the provisions of s. 82 of the Bills of Exchange Act, 1882, nevertheless, applicable to such instruments. But, s. 82 only applying to the case where a banker takes the instrument as agent merely for the purpose of collection, it could only apply if the defendants so took these instruments. They did not so take them, but on their own account as if they were negotiable instruments. They treated them as cheques, and took Jones's indorsement upon them.

Haldane, K.C., and *Hugo Young, K.C.* (*P. G. Henriques* with them), for the defendants in the first action. The most important question in the case relates to class 6 of the cheques, and the position of bankers with regard to the protection given by s. 82 of the Bills of Exchange Act, 1882. It is submitted that that section must have been intended to give protection to

(1) [1901] A. C. 414.

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bankers dealing in the ordinary course of business with crossed cheques drawn on other banks. The practice with regard to such cheques varies in the case of different banks. In the country the practice appears to be at once to credit the customer paying in the cheque with the amount of it. In London that is done by some banks. In the case of other London banks the customer is not credited with the amount of the cheque until it has been collected, and that is also the practice of Scottish banks. The reasonable construction of the section is that it protects the banker who in the ordinary course of business receives a cheque for collection on a customer's account, whether the amount of the cheque is credited to the customer at once or not. The mere fact that the banker becomes a holder for value of the cheque does not prevent him from being an agent to collect the cheque on behalf of the customer. Primâ facie the banker, like any one else who has possession of a cheque indorsed in blank, is the holder of the cheque; but, whether he gives credit immediately for the amount of it or not, he none the less receives it for collection on account of the customer. The banker cannot possibly be entitled to the proceeds of the cheque on his own account, unless the account is overdrawn. What according to the argument for the plaintiff is to be the position of bankers with regard to such cheques as these under s. 82? Are they immediately on receipt of the cheque to consider whether the customer's account is overdrawn or not? The state of the account may vary from day to day, or even from hour to hour, and cheques may be from time to time paid in by the customer. It is not possible to suppose that the banker will with regard to each such cheque paid in be protected by s. 82 or not, according as the account was overdrawn or not at the time when it was paid in by the customer. A banker does not receive money in a fiduciary capacity, and in one sense he always receives cheques and their proceeds on his own account, though of course he becomes his customers' debtor in respect of the amounts so received by him. A reasonable construction of the words "by reason only of having received such payment" is that they are meant to exclude cases in which the

banker does not credit a customer with the amount of the cheque. There is very little authority on this question binding on this Court. The decision of the House of Lords in *Great Western Ry. Co.* v. *London and County Banking Co.* (1) turned on the question whether the person from whom the defendants received the cheque was a customer. In *M'Lean* v. *Clydesdale Banking Co.* (2) the decision of the House of Lords proceeded on the basis that they were bound by the findings of the Court of Session with regard to the question of fact, and that it followed from them that the respondents were onerous holders of the cheque. That the banker is none the less a collector of the cheque for the customer, because in the process of collection he becomes a holder of the cheque for value, is shewn by the judgment of Romer L.J. in *Great Western Ry. Co.* v. *London and County Banking Co.* (3) There is nothing in the case of the *National Bank* v. *Silke* (4) which militates against the defendants' contention. The protection intended to be given by s. 82 must cover all dealings with the cheque, antecedent to the receipt of payment, which are in the ordinary course of business incidental to collection. The crossing of the cheques by the defendants with their stamp was for greater safety in the process of collection, and therefore was incidental to the receipt of payment. Jones's indorsement on the cheques does not take the case out of s. 82. There is really no evidence that it was made at the request of the defendants; but, assuming that it must be taken to have been made at their request, the defendants do not the less collect the cheques for Jones because they make it a condition of their undertaking to do so that he should put his name on the cheques to secure them against any liability they may incur in the course of collecting the amount of the cheque. His indorsement is an inducement to them to undertake the collection of the cheque, and is therefore ancillary to the receipt of payment for him. It is a common thing to make a customer indorse a cheque for the purpose of identifying the person on whose account the cheque is paid in to the bank. Assuming that any of the acts done

(1) [1900] 2 Q. B. 464; [1901] A. C. 414.
(2) 9 App. Cas. 95.
(3) [1900] 2 Q. B. 464.
(4) [1891] 1 Q. B. 435.

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with regard to the cheques prior to the receipt of payment amounted technically to a conversion of the cheque at common law, it is submitted that they caused no damage to the plaintiff, because the bank received the amount of the cheque afterwards for their customer, and by the terms of s. 82 they are not responsible in respect of such receipt. Under the circumstances the plaintiff is not damnified by any dealing of the defendants with the cheques prior to the receipt of payment. It is the receipt of payment which has damnified him, and for that the defendants are by the terms of s. 82 not responsible. The essence of the action for conversion in ordinary cases is that the defendant has by the conversion obtained or dealt with property which belonged to another man, and has thereby deprived him of its value. In ordinary cases the damages for conversion of a negotiable instrument may be its face value, because that may be presumed to be the value of the document, which value has been lost through the conversion: *Bavins* v. *London and South Western Bank*. (1) But any acts of conversion apart from the receipt of payment in this case cannot be considered as having had the effect of depriving the plaintiff of the value of the cheques. The subsequent receipt of payment by the defendants being protected by s. 82, the defendants cannot be considered as having obtained the value of the cheques through any acts of conversion antecedent to the receipt of payment. The words "by reason only of having received such payment" in the section do not mean that the banker shall be responsible if he does anything with the cheque beyond the mere receipt of payment, but that the banker shall not be rendered responsible by reason of receipt of payment. As soon as the section has vested the right to the money as against the true owner in the banker, there cannot as against him remain any right of action for the amount of the cheque in its true owner.

The question under s. 82 is whether the banker has received payment of the cheque "for a customer." It is submitted that the banker in such a case as this receives payment for, i.e., on account of, a customer. The customer is the person who, if

(1) [1900] 1 Q. B. 270.

the cheque is not honoured, will be ultimately the loser. It can make no difference that in the case of country banks it is found a more convenient course, instead of carrying the amount of the cheque to some suspense account, at once to credit the customer's account with it, and to debit him again with it if the cheque is dishonoured. In *Great Western Ry. Co.* v. *London and County Banking Co.* (1) Romer L.J. said in giving judgment that the fact of the bank's crediting the customer with the amount of the cheque at once, and allowing him to draw against it, before they received payment of it, and therefore being holders for value, was not inconsistent with the view that they received payment "for the customer." The result of the contention for the plaintiff would be that a bank could never collect a crossed cheque for a customer with safety, if the account should happen to be overdrawn when the cheque was handed to them, as in such a case it could always be said that they did something more than receive payment for the customer.

With regard to the different classes of cheques: Class 1 consists of cheques which were not crossed when received by the defendants; but on receipt of them the defendants crossed them specially to themselves, which they were entitled to do under the provisions of s. 77, sub-s. 6, of the Bills of Exchange Act, 1882, which provides that, where an uncrossed cheque, or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself. It is submitted that a cheque crossed in conformity with that sub-section is a crossed cheque within the meaning of s. 82, and therefore the defendants are protected from liability in respect of these cheques by that section. The cheque included in class 2 was a cheque payable to bearer, not crossed when it was received by the defendants. The plaintiff admits that he must fail as to that, if his argument on the main point is correct, because then the defendants, having given value for the cheque in good faith, would be holders in due course. On the other hand, if the plaintiff is wrong in his main contention, it is contended that the defendants are protected under s. 82 on the same grounds as in the case of class 1.

(1) [1900] 2 Q. B. 464.

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Class 3 consists of cheques drawn by the manager of one branch of the defendants' bank on the head office, not crossed when received by the defendants, but crossed by them afterwards. It is submitted that the defendants are protected with regard to these cheques by s. 60 of the Bills of Exchange Act, 1882, which protects a banker who pays a cheque in good faith and in the ordinary course of business, although the indorsement is forged: *Charles* v. *Blackwell*. (1) They were probably drawn in the name of the manager in order to meet any difficulty arising from the terms of the definition of a bill of exchange in s. 3, sub-s. 1, of the Bills of Exchange Act, 1882. It is contended that, having regard to the provisions of s. 26 of that Act, these cheques must be taken to be drawn by Henn in his personal capacity. But, treating them as a draft by one branch on the other, the authorities recognise that for many purposes different branches of the same bank are to be treated as distinct persons: *Prince* v. *Oriental Bank Corporation* (2); *Willans* v. *Ayers*. (3) It is a common practice for these cheques to be drawn by one branch of a bank on another. Sect. 5, sub-s. 2, of the Bills of Exchange Act, 1882, provides that, where in a bill the drawer and drawee are the same person, or the drawee is a fictitious person, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note. Having regard to that provision, the definition in s. 3, sub-s. 1, must be taken to include drafts purporting to be addressed by one person to another. It is submitted that these drafts were cheques within the meaning of the Act, and that the defendants are protected with regard to them by s. 82 as well as s. 60. It is further contended that, if these drafts were not cheques within the meaning of the Bills of Exchange Act, 1882, they are brought within s. 82 by the operation of s. 17 of the Revenue Act, 1883. The drafts were "issued by a customer of a banker" to the plaintiff's firm. Therefore s. 17 applies. Class 4 consists of cheques drawn upon the defendants' bank itself, and crossed before they came into the defendants' hands. The defendants are protected with regard

(1) (1877) 2 C. P. D. 151. (2) 3 App. Cas. 325.
(3) (1877) 3 App. Cas. 133.

to these cheques by s. 60. For the purposes of s. 79, sub-s. 2, of the Act, different branches of the same bank must be regarded as distinct persons. See the authorities referred to in relation to class 3. Therefore these cheques were paid to a banker by a banker for the purposes of that sub-section and s. 80. Sects. 79 and 80 do not say that the payment must be made to a banker other than the paying bank. The object of s. 79, sub-s. 2, was merely to prevent payment of a crossed cheque otherwise than through a banker. Alternatively the provisions of s. 79 contemplate a cheque drawn on one bank and presented by another, and therefore do not apply to this case. Class 5 stands on the same footing as class 6 except for the additional fact that the cheques included in it were marked "not negotiable." This fact cannot make any difference. Cheques so marked are within the provisions of s. 82. Class 6 is covered by the general observations previously made as to the position of bankers with regard to the protection given by s. 82. Class 7 consists of cheques payable to bearer, and crossed before they were received by the defendants. Either the defendants were protected as to them by s. 82, or they were entitled to the cheques as holders in due course. Class 8 consists of instruments which are not cheques within the meaning of the Bills of Exchange Act, 1882, but the protection given by s. 82 of that Act is extended to these instruments by s. 17 of the Revenue Act, 1883. Therefore the same considerations apply to the instruments within class 8 as to those within class 6. Sect. 17 expressly provides that nothing in the Act shall be deemed to render such instruments negotiable. Therefore the bank could not take them as holders of negotiable instruments on their own account.

[They also cited *Clarke* v. *London and County Banking Co.* (1)]

Cohen, K.C., and *Spencer Bower*, for the defendants in the second action. The defendants in this case are not liable as for a conversion of the cheques in question. Sect. 82 protects them from liability in respect of their dealings with the cheques prior to receipt of payment as well as in respect of that receipt.

(1) [1897] 1 Q. B. 552.

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The reason why, in such cases as *Ogden* v. *Benas* (1) and *Arnold* v. *Cheque Bank* (2), it has been held that bankers were liable as for a conversion of the instrument was not because there had been a loss or destruction of the instrument regarded as a chattel; for the draft would be returned to the drawer in the ordinary course; but it was because the legal vitality of the instrument was destroyed through payment. There was no dealing here with the cheques antecedently to the receipt of payment which affected the value of the cheques. There is a distinction for this purpose between an ordinary chattel and a negotiable instrument; and confusion may arise if the technical doctrines of the common law with regard to what amounts to a conversion of an ordinary chattel are applied to a negotiable instrument. In ordinary cases, the chattel being lost or destroyed through the conversion, its value is consequently lost. In the case of these cheques, it is not really a question of the loss or destruction of the instrument regarded as a chattel. The action is not in substance in respect of the loss of the pieces of paper, or for dealings with them prior to the receipt of payment, but in respect of the proceeds of the cheques. The main argument of the plaintiff rests on the words "by reason only of having received such payment" in the section. The contention appears to amount to this, namely, that the section only protects the banker from liability for receipt of the money, leaving him liable, as he would have been without the section, for everything that would at common law amount to a conversion of the piece of paper, independently of the receipt of payment of the cheque. The effect of this construction would be to render the protection given nugatory; for in such cases there must always be a dealing with the cheque which would at common law amount to a conversion by the bank independently of the receipt of the money. The taking of the cheque into their possession by the bank would be a conversion of the cheque regarded as a chattel, and it would be useless to relieve the banker of liability in respect of the receipt of payment, if the amount of the cheque could be recovered from him as damages for an independent conversion of the

(1) (1874) L. R. 9 C. P. 513. (2) (1876) 1 C. P. D. 578.

cheque. The section must have contemplated that the real loss to the true owner was by reason of the receipt of payment of the cheque by the banker, and it is impossible to suppose that, in enacting that the banker should not be liable for that, the Legislature meant to leave him liable for antecedent technical conversions of the cheque.

[COLLINS M.R. The argument for the plaintiff hardly seems to go as far as suggested. It may be that the effect of s. 82 is to protect the banker with regard to all dealings with the cheque that are merely ancillary to collection for the customer; but it was argued for the plaintiff that in this case the defendants dealt with the cheques in a way which went beyond the purposes of collection, by taking the indorsement of Jones, and at once crediting him with the amount of the cheques, so constituting themselves holders for value of the cheques.]

It is submitted that what the defendants did was in the ordinary course of business with regard to collection. Why should the indorsement by Jones take the case out of s. 82? It did not injure the plaintiff in any way. There was nothing to shew that it was not in the ordinary course of business for a customer paying in cheques for collection to indorse them with his own name. There was no evidence in this case as to how the indorsements came to be made. It was not shewn that the defendants required Jones to indorse the cheques. Assuming that the cashier receiving the cheque required such an indorsement, is it to be assumed that the cashier had authority to discount or purchase the cheque? The case of *Clarke* v. *London and County Banking Co.* (1) tends to shew that merely giving the customer credit for the amount of the cheque at once cannot take the case out of s. 82, or prevent the banker from being in the position of an agent for collection. The crossing of the cheques by the defendants themselves is authorized by s. 77, sub-s. 6, of the Act, in order that there may be greater safety in collecting the cheque. That being so, it is difficult to see how such crossing is otherwise than ancillary to collection. If the contention for the plaintiff is correct, and s. 82 does not apply to this case, it will be contrary to the general

(1) [1897] 1 Q. B. 552.

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understanding of bankers with regard to the law on the subject, and will involve an alteration of the course of business with regard to collection of cheques for customers in the case of country banks.

[They also cited *Stephens* v. *Elwall.* (1)]

A. T. Lawrence, K.C., in reply. The argument for the defendants really involves the proposition that in every case of collection of a crossed cheque the banker necessarily collects as agent for the customer. Such a proposition appears to be contrary to the view expressed by Lindley J. in *Matthiessen* v. *London and County Bank* (2), and to that expressed by the Earl of Halsbury L.C. and Lord Lindley in *Great Western Ry. Co.* v. *London and County Banking Co.* (3)

COLLINS M.R. These appeals raise questions of considerable difficulty and complication, there being in the first appeal no less than eight different classes of instruments involved. These questions arise in the following manner. The plaintiff, who traded under the firm name of Gordon & Munro, had in his employ a clerk named Jones, who opened accounts with the defendant banks respectively. I will take first the action against the London, City, and Midland Bank. After Jones had opened an account with them, he commenced a series of dealings with cheques, which belonged to the plaintiff, and most of which were drawn upon banks other than the defendants' bank, payable to the order of Gordon & Munro, and crossed. Having obtained possession of these cheques, he forged the signature of the plaintiff's firm on the back of them, and then handed them to the defendant bank, who at once credited him with the amount of the cheques, and he continued to draw on the defendant bank, as and when he required money. His account with the defendant bank would, it appears, have been overdrawn during a large portion of the period covered by these transactions, but for the cheques paid in as before mentioned. The action is brought by the plaintiff, as the true owner of the cheques, against the defendants, as

(1) (1815) 4 M. & S. 259; 16 R. R. 458.
(2) 5 C. P. D. 7.
(3) [1901] A. C. 414.

persons who have dealt with the cheques in a manner amounting to a conversion of them. The question is whether the defendants, who are primâ facie liable, because the forged indorsements gave no title to the cheques, are protected by the provisions of the Bills of Exchange Act, 1882.

There are, as I have said, a number of different classes of instruments with which I shall hereafter have to deal, but the most important class is that to which I have already referred, namely, class 6, consisting of cheques drawn on banks other than the defendants' bank, payable to the order of Gordon & Munro, the indorsements on which were forged, and which were crossed at the time when they were handed to the bank by Jones. The question was raised at the trial whether the defendants had been guilty of negligence in dealing with the cheques as they did. Two questions were left to the jury, the first being whether the circumstances were such as should have put the defendants on inquiry as to Jones's title to the cheques, and the second being whether the defendants had been negligent in what they did. The jury answered the first question in the negative, but they appended a rider to the effect that they desired to express an opinion that more care was desirable on the part of banks in general in respect of cheques of this character. They were not required to give a specific answer to the second question, but the answer to the first question appears to have been treated both by judge and counsel as involving an answer in the negative to the second question, and no further question was suggested. Though I think there was evidence which might have justified a verdict adverse to the defendants on the question of negligence, it appears to me impossible to say that there was no evidence on which the jury were entitled to find as they did. The question was essentially one of fact for them, and, the jury having decided it favourably to the defendants, I do not think that their verdict can be disturbed. That being so, I proceed to the questions of law which arise in the case.

In the first place it is clear, having regard to the provisions of s. 24 of the Bills of Exchange Act, 1882, to which it is not necessary to refer at length, that the indorsement in the name

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of the plaintiff's firm, being a forgery, passed no title to the cheques; and there is nothing in the circumstances of the case to preclude the plaintiff from setting up that the indorsements were forgeries. The question, therefore, as regards these cheques really turns on s. 82 of the Bills of Exchange Act, 1882, which deals with the case of crossed cheques handed to bankers for collection. That section provides that "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The defendants being clearly liable for conversion of the cheques, unless they come within this section, they invoke its protection as a ground of defence, and the question is whether they come within it, or not. If they do not, they stand in the ordinary position of persons who have dealt with a cheque in a manner inconsistent with the title of the true owner on the strength of a forged indorsement.

It is important, before proceeding to the construction of s. 82, to consider what the position of bankers was in such cases with regard to cheques in general before the comparatively recent legislation on the subject of crossed cheques. In dealing with cheques drawn on other banks, they stood unprotected against the risk of a signature on a cheque being forged. They had to take that risk; and, if on the strength of a forged indorsement they dealt with a cheque in a manner contrary to the rights of the true owner, they were liable to an action by him. Then came the legislation as to crossed cheques, the principal object of which was to prevent such cheques being paid otherwise than through bankers. That legislation appears to me to have contemplated the existence of two bankers in reference to the transaction, namely, a banker by whom the cheque is presented for payment and a banker upon whom the cheque is drawn. The existing legislation on the subject is contained in s. 79 of the Bills of Exchange Act, 1882, which provides by sub-s. 1 that "where a cheque is crossed specially to more than one banker, except

when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof"; and by sub-s. 2, that "where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or, if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid." By the legislation with regard to crossed cheques a certain facility is given to the public, and an incidental advantage is given to bankers. The public are enabled to make use of cheques as a means of payment with greater security, because it is rendered impossible for any one not having a banking account to get a crossed cheque cashed; and an incidental advantage accrues to bankers through such a facility being given to customers of banks, and persons being thereby induced to become their customers. The scope of the legislation contained in s. 82 appears to me to be that, the Legislature having invited the public to make use of bankers as agents for the purpose of collecting a certain class of cheques, they also give protection to the bankers who act as such agents. It seems to me primâ facie improbable that the protection given to bankers in respect of the particular class of cheques to which the legislation relates should go beyond that which is incidental to the performance of the particular duty which is by that legislation imposed upon them. Before that legislation, if a banker received the amount of a cheque, he took the risk of forgery. He still has to take that risk in respect of cheques other than crossed cheques. Bankers are now invited to receive crossed cheques as agents for collection, and, being so invited, they are protected in discharging the duty which they are invited to undertake, and no other, namely, the duty of receiving for their customers payment of such cheques in the only way in which payment of them can be obtained, namely, by being presented by a banker to the bank upon which they are drawn. Having regard to the scope and history of the legislation on the subject, one would expect that what was intended to be

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protected would be, not the dealing with such cheques by bankers in the way in which they dealt with cheques in general prior to that legislation, but the dealing with this particular class of cheques, namely, crossed cheques, in the particular manner in which they were by that legislation invited to deal with them.

In the cases before us both the banks, when they received these cheques drawn upon other banks, payable to the order of the plaintiff's firm, and purporting to bear their indorsement, credited their customer in account with the amounts of the cheques, without waiting to see whether the cheques would be paid by the banks on which they were drawn or not. I think that in all cases in which they did that, both in the cases where they took Jones's indorsement on the cheque and those where they did not, though perhaps more clearly in the former set of cases than the latter, they did not merely receive the cheque for their customer and receive payment of it for him. Take first the cases in which Jones indorsed the cheque. That was an act entirely outside the scope of s. 82. The manager of the defendants in the first action, who was called, said that he could not be sure whether the clerk or cashier who received the cheques might not have asked Jones to indorse them. The clerks or cashiers who received the cheques were not called. The manager, in effect, admitted that, if Jones had not indorsed the cheques, he would have been required to do so, and they would not have been received if he had not done so. I think that on the evidence it must be taken that the indorsement by Jones was at the instance, or at any rate with the assent, of the defendants. If authority were necessary to shew that so receiving a cheque without any title to it, and taking an indorsement upon it, which purported to confer a right to it as against the true owner, would, apart from any statutory provision, be a conversion of the cheque at common law, there is abundant authority for that proposition in the case of *Fine Art Society* v. *Union Bank of London*. (1) Fry L.J., who delivered the judgment of himself and Bowen L.J. in that case, said: "Now first as to conversion. We are of opinion that, when

(1) (1886) 17 Q. B. D. 705.

Mugford handed a post-office order across the counter of the bank with a direction to the defendants to take it, and to receive the money for it, and to carry that money to the credit of his account, and when the bank clerk so took the post-office order, the bank converted it; for to use the language of Lord Ellenborough in *M'Combie* v. *Davies* (1), 'A man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?'" In those cases in which the defendants took the indorsement of Jones given at their instance or with their assent, there can be no question, I think, that that was something entirely outside the scope of s. 82; for no reason can be suggested why it should be ancillary to the receipt of payment of the cheque for their customer that the defendants should become holders of the cheque and take an indorsement from Jones, and so get a right of action on the cheque against him. In the cases in which that incident occurred, I do not see how it is possible to suggest that the case comes within the words of s. 82. It is all one transaction, and the bank chose as part of it to take a step which was quite outside anything necessary for the purposes of collection, and which purported to give them an independent right of action as holders of the cheque. I wish, however, to rest my judgment not merely on that point, but on a larger principle, which also covers the cases where Jones did not indorse the cheques. As I have already said, it appears to me that, for the reasons I have given, the protection afforded by s. 82 must be limited to that which is necessary for the performance of the duty which by the legislation as to crossed cheques was imposed on bankers. If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques, and in which they deal with cheques other than crossed cheques at the present time, namely, by treating them as cash, and upon receipt of them at once crediting the customer with the amount of them in the ordinary way, instead of making themselves a mere conduit-pipe for

(1) (1805) 6 East, 538; 8 R. R. 534.

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conveying the cheque to the bank on which it is drawn, and receiving the money from that bank for their customer, I think they are collecting the money, not merely for their customer, but chiefly for themselves, and therefore are not protected by s. 82.

I should have been of that opinion in the absence of authority; but the matter is not free from authority. There is the case of *Matthiessen* v. *London and County Bank* (1), which was cited in the House of Lords in *Great Western Ry. Co.* v. *London and County Banking Co.* (2) In that case Lindley J. said in giving judgment: "The second part of the section does not relate to cheques, but to the proceeds of cheques." He was there referring to s. 12 of the Crossed Cheques Act, 1876, which is in terms substantially the same as those of s. 82. He then proceeds: "The customer of the bank gets no better title than his transferor, not only when the cheque is marked 'not negotiable,' but when it is not so marked, if it is not an open but a crossed cheque. The bank in either case deals with the proceeds. If the bank has the cheque, it may be stopped in their hands. The customer gets no better title than the person from whom he took it. But, when the bank has got the proceeds, and the true owner says to the bank, 'Hand me those proceeds,' the Legislature in the second part of the 12th section says, 'No; if you, the bank, have collected only the proceeds of the cheque for your customer, we will not render you responsible for the proceeds when you have dealt with the cheque in the only way in which, as a matter of business, you could deal with it. If you have done anything more: if you have applied it to your own use, that is another matter; but, if you have simply collected it through the clearing house in the only way in which a banker collects cheques, and that is all you have done, the true owner shall look through you to your customer, and he and not you must be responsible to the true owner for the proceeds.'" It seems to me that what the defendants here did comes exactly within those words of Lindley J., and that, by treating these cheques as cash, they have gone outside the protection given by s. 82.

(1) 5 C. P. D. 7. (2) [1900] 2 Q. B. 464; [1901] A. C. 414.

It must be remembered that they were dealing all through with stolen property, and that any act done by them inconsistent with the title of the true owner would be a tort at common law, and they could not justify any dealing by them with the cheques except so far as they could bring themselves within the protection afforded by s. 82. After *Matthiessen* v. *London and County Bank* (1) came the case of *Bissell & Co.* v. *Fox Brothers & Co.* (2), in which the very same question arose as in the present case. In that case Denman J., in dealing with certain cheques which, like those in the present case, were crossed cheques payable to order, came to the conclusion, as one ground of his judgment, that the cheques had been dealt with by bankers to whom they were handed for collection in a manner which put them outside the protection given by the section. In that case, as in the present case, what the defendants had done was to treat the cheques as cash—that is to say, instead of waiting and collecting the amount of the cheques from the bank on which they were drawn on behalf of their customer, and then crediting him, they at once credited the customer with the amount of the cheques. The case appears to me to have been absolutely on all fours with the present case, and, as I have said, Denman J. held, as one ground of his judgment, that the defendants in so dealing with the cheques were outside the protection of s. 82. It is true that he also held as an independent ground of his judgment that the defendants had been negligent. The case subsequently came before the Court of Appeal, and that Court, apparently without impugning anything that was said by Denman J. as to the other ground, founded their judgment only on negligence on the part of the defendants. There being ample evidence of negligence on their part, there was no necessity for the Court of Appeal to deal with the other ground. In the course of last year the case of *Great Western Ry. Co.* v. *London and County Banking Co.* (3) came before this Court, which decided that the bank in that case was protected. There one Huggins, who had been in the habit of getting crossed cheques, drawn on

(1) 5 C. P. D. 7. (2) 51 L. T. 663; 53 L. T. 193.
(3) [1900] 2 Q. B. 464; [1901] A. C. 414.

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other banks, presented by the defendant bank, although he had no account with them, was treated by this Court as a customer of the defendant bank for the purposes of s. 82 of the Bills of Exchange Act, 1882. In the particular case which came before this Court, he had obtained from the plaintiffs by false pretences a cheque which was drawn to his order and crossed with the words "not negotiable." He had indorsed the cheque and handed it to the defendants, who had paid part of the amount of the cheque to him in cash, and placed the remainder of it to the credit of certain persons by his directions. The plaintiffs sued for the amount of the cheque, and, the provisions of s. 82 being put forward as a defence by the defendants, this Court held that they were entitled to the protection of that section. The House of Lords held on appeal that Huggins was not a customer of the bank within the meaning of that section, and, therefore, the bank was not entitled to the protection given by it. The question, which is similar to that arising in the present case, namely, whether, assuming Huggins to have been a customer of the defendants, they would have been protected by the section, was argued; and, though I do not say that it was in terms decided, the tendency of the opinions which were given by the learned Lords who delivered judgment seems to me to be strongly in favour of the view which I am now expressing. The Earl of Halsbury L.C. said: "The language of the statute seems to me to be clear enough. It would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money. The 82nd section, which contemplates the receipt of such a cheque received in the ordinary course of business for a customer of the bank, seems to me to contemplate a totally different class of transaction from what is disclosed in this case. The bank thought proper to take this cheque as representing its face value, and, if Huggins had no title, as he certainly had not, there is nothing in the 82nd section which will entitle them to treat it as receiving payment for a customer." It seems to me that those observations point in the direction of what I have stated. Lord Shand said that he agreed with the judgment about to be delivered by Lord Lindley. Lord Davey does not

deal with this point. The speech of Lord Brampton appears to bear very distinctly upon it in several passages. He describes (1) a transaction which would be protected by s. 82, though he does not in terms define what transactions would be so protected, or say that no other transaction than that described would be protected. He said: "Huggins had no banking account at all anywhere. It is not necessary to say that the keeping of an ordinary banking account is essential to constitute a person a customer of a bank, for, if it were shewn that the cheques were habitually lodged with a bank for presentation on behalf of the person lodging them, and that *when honoured* the amount was credited and paid out to such person, whether with or without any profit to the bank for so presenting them, I would not say that such transactions might not constitute such person a customer within the meaning of the 82nd section; indeed, I think they would. But as between Huggins and the Wantage branch of the respondents' bank the transactions amounted to nothing of the sort." It seems to me that in those words he suggests a standard which would imply that anything coming short of it would not bring a banker within the protection of s. 82. He says further on: "I should further observe that the language of the 82nd section is where a banker 'receives payment for a customer.' In the case before your Lordships, on every occasion of cheques so cashed the money had already been given to Huggins in exchange for the cheque, the money paid to the respondents has been received on their own account to reimburse them, and not on account of Huggins at all." Lord Lindley said: "Upon the other point, it is plain to me that the bank obtained payment of the cheque for themselves and not for Huggins. Whether the bank is to be regarded as having purchased the cheque, or as having advanced him its amount on the security of it, seems to me immaterial. The bank wanted the money for themselves and not for him. They were entitled to hold the money as against him, and were under no obligation to remit it to him. In no ordinary sense of the expression can the bank be regarded

(1) [1901] A. C. at p. 422.

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as collecting the money for him, although, no doubt, if the bank could keep the money, all liability on his part would be at an end, and in that way he would be benefited by their receipt of the money. Sect. 82 of the Act is a mere reproduction of the previous Act of 1876, and the construction put upon that Act in the case of *Matthiesson* v. *London and County Bank* (1) was, in my opinion, correct. In *Clarke* v. *London and County Banking Co.* (2) the cheque was paid in for collection, and this was the ratio decidendi." I think it may be inferred from these judgments that the House of Lords, if the facts had rendered it necessary to decide the point, would have taken with regard to it the same view as I am expressing. A word or two with regard to the case of *Clarke* v. *London and County Banking Co.* (2) In certain of the cases which have come before the Courts the bankers appear to have in point of fact refrained from crediting the customer with the amount of the cheque at once, and to have waited till it was collected before doing so. *Clarke* v. *London and County Banking Co.* (2) seems to have been such a case. There Cave J.—whether rightly or wrongly is for the present purpose immaterial—dealt with the case on the footing that the cheque was received merely for collection, and that no credit was given to the customer for the amount of it till it was actually collected. The statement of facts in the report is to the effect that one Fisher, who had an account with the defendants' bank, forged the indorsement on a cheque which he had received for the plaintiff, and "paid the cheque so indorsed into his own account for collection. At that time Fisher's account was overdrawn to the extent of 13*l.* 9*s.* Upon receipt of the said cheque the defendants allowed Fisher to draw a cheque upon them for 5*l.* 8*s.* 6*d.*, which they cashed. Subsequently the defendants received payment of the first-mentioned cheque from the Bank of England, and placed the amount to the credit of Fisher's account." So that, apparently, as a matter of fact the bank did not credit Fisher with the amount of the cheque until they had received the amount of it from the bank on which

(1) 5 C. P. D. 7. (2) [1897] 1 Q. B. 552.

it was drawn. It is true that Fisher drew a cheque which the bank cashed after he had handed them the plaintiff's cheque; but Cave J. seems to have thought—as to whether that view can be supported or not I pronounce no opinion—that the cheque for 5*l.* 8*s.* 6*d.* was not cashed on any credit given on account of the plaintiff's cheque, because the amount of that cheque was not credited to the customer till after it was collected, and that therefore the case was one of mere collection of the cheque by the defendants. It appears to me that up to this point the authorities are all one way to the effect that, unless the bank, which claims the protection of s. 82, can shew that they acted strictly within the lines of that section, they are not entitled to protection under it. It is clear law, as shewn by many cases cited to us, that in the case before us the bank constituted themselves holders for value of the cheques by giving their customer credit for their amounts, and would, but for the indorsements being forged, have acquired a title to sue on their own account the drawers of the cheques, and any other person whose name was upon them. Counsel was asked during the argument why it was necessary for the purpose of collection that they should do this, but no satisfactory answer was given to the question. It was said that it was the custom for banks to carry out the collection of cheques in this way. I do not gather from the authorities to which we have been referred that this is so. Take for example the case of *Clarke* v. *London and County Banking Co.* (1), to which I have just referred, and I would also refer to the case of *Lacave & Co.* v. *Crédit Lyonnais* (2), from which it appears that the practice of the Parisian bank in that case, to which a cheque drawn on their branch in London had been handed for collection, was to wait until they received an intimation from the London branch that the cheque would be honoured before they gave cash for the cheque. The view taken in cases such as *Bissell & Co.* v. *Fox Brothers & Co.* (3) and *Ex parte Richdale* (4), namely, that crediting the customer in account with the amount of the

(1) [1897] 1 Q. B. 552.
(2) [1897] 1 Q. B. 148.
(3) 51 L. T. 663; 53 L. T. 193.
(4) 19 Ch. D. 409.

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cheque constitutes the bank holders for value of the cheque, was, in the case of *Royal Bank of Scotland* v. *Tottenham* (1), pushed to its logical result; and, though the bank in that case had sought to debit the customer again with the amount of the cheque, it was held that nevertheless they were in a position to sue the drawer upon it. It seems to me that these considerations decide the main point in both of the cases against the defendants.

There remain for decision a number of subsidiary points in the first case which are somewhat complicated, but may, I think, be dealt with more or less briefly. The 1st class of cheques are cheques which were not crossed at the time when Jones handed them to the defendants, but which the defendants themselves crossed afterwards. The question is whether these cheques come within the terms of s. 82. It is true that s. 77, sub-s. 6, empowers a banker, where an uncrossed cheque is sent to him for collection, to cross it specially to himself. That is a facility given for the purpose of affording additional protection during the process of collection after the crossing of the cheque. But the defendants were dealing with cheques in respect of which, at the time when they received them, they were not protected at all. They received uncrossed cheques drawn on other banks the indorsements upon which were forged. How are they protected in respect of those cheques up to the time when they themselves crossed them? They took the cheques, which were then not within the section, and dealt with them in such a manner as, according to the authorities, to constitute a conversion of them to their own use. They cannot purge that conversion and put themselves in any better position by subsequently crossing the cheques themselves. As to that class, therefore, I think our judgment must be for the plaintiff.

Class 2 consisted of a cheque payable to bearer, and as to that it is conceded that the plaintiff cannot succeed.

Class 3 is one which raises some difficulty. It is a case in which drafts were drawn by one branch of the defendants' bank upon another branch. The drafts were signed by Henn,

(1) [1894] 2 Q. B. 715.

the manager of the drawing branch. It appears to me that, from the terms of the instruments and the fact that Henn signs as manager, it is clear that they were drawn by him merely as agent, and they were really drafts by one branch of the bank on another. The defendants contend that they are protected in respect of these instruments by s. 60 of the Bills of Exchange Act, which provides that "when a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to shew that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged, or made without authority." It is argued for the defendants that these documents are cheques, and therefore bills within that section. On the other hand it is contended that they are not. By s. 73 a cheque is defined to be "a bill of exchange drawn on a banker payable on demand"; and by s. 3, sub-s. 1, a bill of exchange is defined as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer." The plaintiff's counsel say, and I can see no answer to their contention, that these instruments are not addressed by one person to another, being merely addressed by one branch of the bank, which is a limited company, to another branch. It seems to me that primâ facie these instruments are not within the Bills of Exchange Act, 1882, at all. It is, however, argued that they are brought within its provisions by the Revenue Act, 1883, s. 17 of which provides that ss. 76 to 82, both inclusive, of the Bills of Exchange Act, 1882, "shall extend to any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said

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document were a cheque." The word "issue" is defined by s. 2 of the Bills of Exchange Act, 1882, as meaning "the first delivery of a bill or note complete in form to a person who takes it as a holder." In the case of these drafts the only issue in point of fact was, not by a customer of the bank, but by the branch bank to a customer. Therefore, it seems to me that these instruments are outside s. 17 of the Revenue Act, 1883, also. The result is that they are not within the Bills of Exchange Act, 1882, independently of the Revenue Act, 1883, and s. 17 of that Act does not suffice to bring them within it. Consequently, they are not covered either by s. 60 or by s. 82. Therefore, as to that class our judgment must be for the plaintiff.

We now come to class 4, as to which a point arises that is somewhat curious and difficult, though I think that, if one is at liberty to apply common sense to the construction of the sections involved, the defendants ought to succeed. The cheques in question are crossed cheques drawn on one branch of the defendants' bank and handed to another branch for collection. Entries were made in the books of one branch in favour of the customer who presented the cheques for collection, and entries were made in the books of the other branch, whereby it was debited and the first-mentioned branch was credited with the amounts of the cheques. The transactions were between different branches of the same bank; but in the result the effect was that one branch of the bank by means of that process paid these crossed cheques. It is argued that, the cheques being crossed cheques, the transaction is unprotected by reason of the provisions of s. 79 of the Act, which forbids the payment of a crossed cheque otherwise than to a banker. It is said that these cheques were not paid to bankers at all, but in substance to the customer, and therefore the terms of s. 79 have been violated. On the other hand, it is clear that, but for the terms of s. 79, and the cheques being crossed, the defendants would be protected in respect of these cheques by s. 60; and it would, I think, be a curious and anomalous result, if the bank were in a case like this deprived of that protection by the legislation with regard to crossed cheques,

the object of which was to make such cheques only payable through bankers, and became liable for paying these cheques which, apart from that legislation, they could safely have done under s. 60. It seems to me that the difficulty may fairly be met by giving a reasonable construction to the words of s. 79. The defendants, whose branch bank receives payment from another branch, are certainly a bank. It may be that the payment is to themselves: still it is a payment made to a bank, and the payment is also by a bank. That being so, I think that without too much straining of the words of the section the case may be brought within it. I think that the case for the defendants may be put alternatively in this way. Either the case is outside the legislation as to crossed cheques, which does not apply to a case where the circumstances do not admit of two banks being involved in the transaction, and so the defendants are within s. 60; or, if the case is within s. 79, the payment by one branch of the bank to the other satisfies the requirements of that section.

We now come to class 5, namely, the cheques which were marked not negotiable. It was not contended that the marking of the cheques with the words "not negotiable" would of itself take the case out of s. 82, if the terms of that section had in other respects been complied with; but it was argued that that fact afforded an additional ground for the inference that, in dealing with these non-negotiable cheques as they did, and becoming holders of them, the bank were acting outside the scope of s. 82. It seems to me that with regard to these cheques also the plaintiff is entitled to succeed. No question now arises as to class 7. The case with regard to class 8, which are not negotiable instruments, appears to me to be decided by what I have already said as to classes 5 and 6.

I have now disposed of all the classes of cheques involved in the first action. What I have said incidentally disposes of the questions involved in the second case. I should agree with the argument of the defendants' counsel in that case if I thought that the contention for the plaintiff involved the narrow construction of s. 82, that nothing is protected by it but the actual receipt of payment of the cheque. The

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argument of the defendants' counsel, as I understood it, was that necessarily in such cases as this there would be acts amounting to a conversion of the cheque before the receipt of the money, and therefore the section would be nugatory, if such a narrow construction were put upon it. But I did not understand the contention for the plaintiff to be as suggested, though some of the expressions used by the plaintiff's counsel in argument might countenance that suggestion. The fair meaning of the section, which I need not read again, is that its protection cannot be limited to the mere receipt of the money. It seems to me that it covers, and was meant to cover, the whole transaction of receiving payment—that is to say, all the necessary dealings with the instrument from its receipt by the bank down to its payment by the bank upon which it is drawn. Everything that is reasonably incidental to the receipt of the money for the customer is I think included, but anything that is not so incidental is I think outside the section. In this case the defendants in dealing with the cheques acted in a manner which their counsel failed to explain on the assumption that they were merely acting as the agents of their customer for collection. It seems to me, therefore, that they are outside the protection given by the section. For these reasons I think that the appeals must be allowed, and judgment must be entered for the plaintiff in both actions for the amount of the cheques in respect of which the defendants are not protected.

STIRLING L.J. I have come to the same conclusion as the Master of the Rolls. In dealing with the two actions I will first direct my observations to class 6 of the cheques which are the subject of the first action, and to those which are the subject of the second action. All those cheques were drawn upon banks other than the defendant banks, and were payable to the order of the plaintiff's firm, and crossed. They were stolen by the plaintiff's confidential clerk, Jones, who indorsed them by forging the name of the plaintiff's firm. The cheques were then handed by Jones to one or the other of the defendant banks, with which he had an account, as the case might be,

and the amounts of them were subsequently received from the banks on which they were drawn by the defendants. It is not disputed that but for the provisions of s. 82 the defendant banks would be liable to the plaintiff as the true owner of the cheques. Apart from that section, the defendants would have committed a tort by conversion of the plaintiff's cheques to their own use, as is shewn by the cases referred to, among which were *Arnold* v. *Cheque Bank* (1) and *Fine Art Society* v. *Union Bank of London*. (2) Sect. 82 substantially reproduces the provisions of s. 12 of the Crossed Cheques Act, 1876, by which Act crossed cheques were made payable only through a banker. The object of that section obviously was to afford protection to bankers who were practically compelled by the legislation to collect such cheques for their customers. Neither s. 12 of the Act of 1876, nor s. 82 of that of 1882, is expressed in language perfectly apt to protect bankers from liability to the true owner of the cheques in respect of every act of technical conversion involved in such cases. The clause in both Acts appears to be framed as if the liability of the banker only arose by reason of the receipt of payment of the cheque. It is clear from the judgment of Bowen L.J. and Fry L.J. in the case of *Fine Art Society* v. *Union Bank of London* (2) that, apart from statute, in such a case as the present the bank is guilty of at least two acts of conversion—first, at the time of the receipt of the cheque; and, secondly, at the time of the receipt of payment of it. But it is, nevertheless, plainly the intention of the Legislature to protect the banker in such cases from liability by reason of the receipt of the cheque as well as from liability by reason of the receipt of the payment. To protect the banker from liability in respect of receipt of the payment would be perfectly futile unless he were also protected from liability in respect of the conversion at an earlier stage of the transaction. It seems to me that the section must be construed so as to cover every act which is necessarily incidental to the transaction of receiving payment, from the receipt of the cheque in the first instance down to the conclusion of the transaction by receipt of payment of the cheque. I read the words "by reason

(1) 1 C. P. D. 578. (2) 17 Q. B. D. 705.

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only of having received such payment" as referring, not merely to the receipt of payment of the cheque, but to the receipt of payment in the circumstances detailed in the earlier part of the section, which are in substance that the banker should have received the payment in good faith and without negligence and as agent for a customer. That this was the interpretation put upon the Act of 1876 by Lindley J. in *Matthiessen* v. *London and County Bank* (1) is clear from the passage in his judgment, where he says: "But, when the bank has got the proceeds, and the true owner says to the bank, 'Hand me those proceeds,' the Legislature in the second part of the 12th section says, 'No; if you, the bank, have collected only the proceeds of the cheque for your customer, we will not render you responsible for the proceeds when you have dealt with the cheque in the only way in which, as a matter of business, you could deal with it. If you have done anything more; if you have applied it to your own use, that is another matter; but, if you have simply collected it through the clearing house in the only way in which a banker collects cheques, and that is all you have done, the true owner shall look through you to your customer, and he, and not you, must be responsible to the true owner for the proceeds.'"

In the present case it was not disputed that both of the defendant banks acted in good faith. The jury found that they acted without negligence in both cases. Jones was undoubtedly a customer of both the banks. The only question which remains is whether the banks respectively received payment of these cheques for Jones as their customer. I think the question is exactly that put by Lord Blackburn in *M'Lean* v. *Clydesdale Banking Co.* (2), namely: "Did the bank get the cheque as a mere agent and nothing else, or did they get it in order that they might have the property in it transferred to them, and that they might become the holders of it?" The facts of the cases respectively bearing on that question were these. In the first case the course of business was that each cheque as received was at once credited to Jones, and he was at liberty to draw against it, an overdraft

(1) 5 C. P. D. 7. (2) 9 App. Cas. 95, 109.

being permitted to such extent as the manager in his discretion thought fit. Furthermore, Jones himself in all cases indorsed the cheques. The bank manager admitted that, if he had not, he would have been required to do so, in order that the bank might have the security of his name. I draw the inference that it was agreed between the bank and Jones that the cheques were handed to and received by the bank, not for collection merely, but so that the bank might acquire the property in and become holders of the cheques. So much for the first case. In the second case what appears is this. The cheques were in every case credited at once to Jones in the books of the bank. There is no evidence of any express bargain between the bank manager and Jones; but it does appear on examination of the account that, in several cases, on the same day on which cheques were paid in, Jones drew cheques against the amount of those cheques to an amount which would not have been met but for the amount credited in respect of the cheques paid in by Jones. I think that the same inference ought to be drawn as in the other case, namely, that there was an agreement between the bank and the customer that the latter should at once have credit for the amount of the cheque and be entitled to draw against it. That being so, I think that the case comes within the authority of *Ex parte Richdale* (1) and *Royal Bank of Scotland* v. *Tottenham*. (2) In both cases, therefore, I think that the plaintiff is entitled to succeed on the ground that the defendants have not confined themselves to acting merely as agents for the collection of the cheques, but have made themselves holders for value of the cheques. For the same reasons I think that in the case of the cheques forming the subject-matter of the second action which were not indorsed by Jones as well as those so indorsed, the plaintiff is entitled to succeed.

I now come to the remaining classes of cheques forming the subject-matter of the first action, with regard to which I wish to make a few observations. The first class consists of cheques which were drawn to order, and were not crossed when received by the bank, but were crossed by the defendants

(1) 19 Ch. D. 409. (2) [1894] 2 Q. B. 715.

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themselves. It was argued that the defendants, by crossing the cheques, could bring themselves within the protection of s. 82. If that contention were well founded, it would follow that, in every case in which bankers receive an uncrossed cheque, they can protect themselves from liability to the true owner by crossing the cheque. I do not think that is the meaning of the section. It appears to me that that construction would go beyond what appears to have been the object of the Legislature, namely, to protect bankers from liability in respect of the collection of cheques which are only payable through a banker. Sect. 77, sub-s. 6, cannot, as it appears to me, afford any protection to the bankers in this case, because it only provides that, where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself. Therefore, where the banker simply acts as agent for the collection of a cheque, he may protect himself against dishonesty by crossing the cheque specially to himself; but here the defendants did not act merely as agents for collection, but assumed the position of holders of the cheque for value.

Passing by class 2, as to which there is now no question, I come to class 3, which consisted of orders drawn by the manager of one branch of the defendants' bank upon another branch. The objection was taken for the plaintiff that these instruments were not really cheques within the meaning of the Bills of Exchange Act, 1882, because they did not come within the definition of a cheque given in that Act by s. 73, not being orders addressed by one person to another within the meaning of s. 3, sub-s. 1. These are really instruments addressed by the manager of a branch as agent for the bank to the bank itself. I think that they are not really bills of exchange within the terms of s. 3, sub-s. 1, and that s. 26, sub-s. 1, does not assist the defendants in this respect. Sect. 5, sub-s. 2, was also relied on, which gives the holder of such an instrument as therein referred to an option of treating the instrument either as a bill of exchange or as a promissory note; but the difficulty here is that, as against the plaintiff, the defendants were not holders of the instruments, because

the indorsements were forgeries. The Revenue Act, 1883, s. 17, only applies where the instrument is issued by a customer of a bank. In this case the instrument was not issued by the customer, but by the bank to a customer. I agree, therefore, that the defendants are not protected in respect of this class of instruments.

Class 4 consists of cheques drawn by customers of the defendant bank upon that bank payable to the order of the plaintiff's firm, and crossed when handed to the defendants. The defendants dealt with those cheques when paid in by debiting one customer, i.e., the drawer, and crediting another customer, who was ostensibly the holder of the cheque, with the amount. It was argued that, if not protected by s. 82, the defendants are protected as to these cheques by s. 60, which protects a banker who pays a bill drawn upon him payable to order on demand in good faith and in the ordinary course of business, although the indorsement is forged. By s. 73 a cheque is defined to be a bill of exchange drawn on a banker payable on demand, and therefore would fall within the terms of s. 60; and it is provided that "except as otherwise provided in this Part (that is Part 3) the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque." Therefore, unless there is some provision in the third part of the Act to the contrary, s. 60 will apply. The plaintiff contends that ss. 79 and 80 of the Act do provide to the contrary of s. 60. But, when those sections are looked at, they appear to me to contemplate the case of a crossed cheque which is drawn on one banker being handed to another banker for collection. If that be so, there is nothing in this part of the Act to take the case out of s. 60. The matter seems to me to stand thus. Either ss. 79 and 80 give the required protection to the bankers, because the payment in such a case as this is made to a banker within the meaning of those sections; or, if those sections are not applicable, then there is nothing to take the case out of the provisions of s. 60. The mode in which the cheques were dealt with in this case, namely, by carrying the amount of the cheque to the credit of the customer paying in the cheque, was in *Bissell & Co.* v. *Fox*

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Brothers & Co. (1) treated by the Court of Appeal as a good payment within s. 60. In these circumstances I think that the defendants are entitled to the protection of s. 60 in respect of class 4.

As regards class 5, the cheques in which were crossed and marked "not negotiable," the defendants cannot be in a better position as to those than they are in respect of the cheques included in class 6. As to class 7 no question now arises. With regard to the instruments in class 8, these were not really cheques at all, and the defendants claim the protection given by the Revenue Act, 1883; but for the reasons already given I think that protection is not applicable in the circumstances of the present case. For these reasons I think the appeal should in both cases be allowed.

MATHEW L.J. I am of the same opinion. With regard to the greater number of the cheques to which the first action relates, namely, those included in class 6, and the cheques involved in the second action, it cannot be, and was not disputed, that but for the provisions of s. 82 the defendants would be unprotected, whether they received these cheques merely for collection for a customer or not. Such is the result of the authorities which are said to have led to the legislation for the purpose of protecting bankers in the collection of crossed cheques. If these cheques had been handed to the banks merely for collection, and on the understanding that the customer was not to be credited with the amounts of them till the cheques were cleared, nevertheless, apart from s. 82, the bankers who cleared the cheques and appropriated the money to their customer would have been liable to the true owner of the cheques. It is said that it was to prevent such a hardship to bankers placed in that position that the provision now embodied in s. 82 was originally made. Before considering the effect of that section, it is desirable to refer to the evidence with regard to Jones's account. Jones was apparently a man in a small way of business, and it was only by his larcenous proceedings with regard to the cheques in question that he

(1) 51 L. T. 663; 53 L. T. 193.

contrived to keep his account in credit. The manager of the defendants in the first action was examined as to what he knew of Jones, and, being aware of the importance of shewing that the cheques were taken by the defendants for collection only, he struggled with the questions of counsel in cross-examination as well as he could, but he was ultimately compelled to admit in substance that in every case the indorsement of Jones was taken for the purpose of securing the bank. It is therefore established that in such cases the course of dealing with regard to Jones's account was that his indorsement was always taken. We are told that the practice of bankers in the City of London and in Scotland is not to credit the customer in such cases until the cheque has been cleared. In this case a different course of business was pursued; and one can well understand why it should be desirable for banks on the one hand, willing to have accounts opened with them by traders in a small way of business in different parts of the country, and for such traders on the other hand, that the bank should in such cases treat cheques as cash as soon as received without waiting till they are cleared. Accordingly it appears that in the case of these cheques, and in the case of country banks generally, the course is taken of at once crediting the customer with the amount of the cheque, and afterwards proceeding to clear the cheque. No doubt in such a case the cheques are received on the terms that the amount shall be credited in account, and that, if the cheque is subsequently dishonoured, the customer may be debited with the amount of it; but no one can doubt that, as was held in *Royal Bank of Scotland* v. *Tottenham* (1), the bank would be in a position in the event of the insolvency of the customer to sue the other parties to the cheque upon it. The case of *Royal Bank of Scotland* v. *Tottenham* (1) indicates the course of business in such cases. There the bank had debited the customer with the amount of the cheque on its being dishonoured; but it was nevertheless held that they were entitled as holders of the cheque to sue the other parties to the cheque, having taken it under circumstances similar to those in the present case. It is

(1) [1894] 2 Q. B. 715.

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argued that, notwithstanding the course of business pursued in these cases, the defendants are protected by the provisions of s. 82. To determine whether that is so, one must consider the language and also the history of the section. It deals with crossed cheques only, and does not protect bankers in respect of any other cheques. It reproduces legislation which followed upon the introduction of a comparatively new course of business, namely, that of crossing cheques with the effect that they are only payable through a banker. That practically imposed upon bankers the obligation of assisting their customers to obtain payment of cheques so crossed. In return for this obligation the bankers stipulated for the protection that, in cases where cheques were handed to them for the purpose of collection in the ordinary course of business, and they acted only as the agents of their customers for that purpose, they should not be liable by reason of receiving payment of the cheques. Having regard to the language of the section, I think it clearly contemplates cases in which bankers have acted only as agents for the purposes of collection. In cases where the usual practice of London and Scottish banks is followed, that is to say, where the cheque is taken for the purpose of collection for the customer only, the understanding being that the customer is not to be credited till the cheque is cleared, and the steps taken by the bank are only such as are in the ordinary course of business ancillary to receiving payment of the cheque for the customer, s. 82 no doubt applies, and the bank is protected with regard to all the steps which are necessarily taken for the purpose of collecting the amount of the cheque for the customer. But I do not think the section goes beyond that. I do not think it was intended to apply to a case like the present. In this case I think the proper inference from the facts is that the defendant banks became holders for value of the cheques, and, assuming the indorsements of the plaintiff's firm to have been genuine, they would have been entitled to sue on the cheques on their own account. They would, although of course in practice the probability of such a thing is remote, have had a right to transfer the cheque to some one else, or pledge it as a security for a liability of their own. How

then can it be said that the liability sought to be established against them was only by reason of receiving payment of the cheques for a customer? The argument for the defendants really ignores altogether the effect of the word "only" in the section. That argument, if correct, would shew that bankers can deal with a crossed cheque in any way they please, and, whether they act merely as agents for collection or assume the position of holders for value, on receipt of payment of the cheque, they are under no liability to the true owner. I cannot come to the conclusion that this is so. For these reasons I do not think that the defendants are entitled to the protection given by s. 82 in respect of these cheques. It is not necessary for me to go through the authorities, which have been sufficiently referred to by the Master of the Rolls. With regard to the subsidiary points raised as to the other classes of cheques, which were both numerous and puzzling, and which have been carefully considered, I have nothing to add to what has been already said by the Master of the Rolls and my brother Stirling.

Appeals allowed.

Solicitors for plaintiff: *Pepper, Tangye & Co., for Pepper, Tangye & Winterton, Birmingham.*

Solicitors for defendants in first action: *Keen, Rogers & Co.*

Solicitors for defendants in second action: *Cameron, Kemm & Co.*

E. L.

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Nov. 7.

W. H. SMITH & SON *v.* KYLE.

Shop Hours Act, 1892 (55 & 56 *Vict. c.* 62), *ss.* 4, 9—*Shop—Temporary Newspaper Stall at Railway Station—Notice of Hours of Employment of Young Persons.*

By the Shop Hours Act, 1892, s. 4, "In every shop in which a young person is employed a notice shall be kept exhibited by the employer in a conspicuous place referring to the provisions of this Act and stating the number of hours in the week during which a young person may lawfully be employed in that shop." By s. 9, "In this Act, unless the context otherwise requires, 'shop' means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire . . . ."

A firm of newsagents employed a boy at their bookstall at a railway station, upon which stall the notice required by s. 4 was duly exhibited. For a portion of the morning the boy was employed in delivering newspapers in a village about two miles distant, and in selling newspapers on the platform of the village station from a temporary structure put up each morning by himself and consisting of a board lying on trestles; upon this structure no notice under s. 4 was exhibited:—

Held, that the board and trestles were not a shop within the meaning of s. 4 of the Act, and that the employment of the boy was at the bookstall of the principal station, where a notice was exhibited:

Semble, that a stall composed of a board and trestles would be a shop within the meaning of s. 3 of the Act, which limits the hours of employment of young persons in or about shops.

CASE stated by justices for the Reigate division of Surrey.

An information had been preferred by the respondent against the appellants charging that the appellants on March 23, 1901, at the parish of Merstham, then being the employers of a certain young person in a stall there, failed to keep exhibited therein the notice required by s. 4 of the Shop Hours Act, 1892, and s. 1 of the Shop Hours Act, 1895. (1)

On the hearing of the information the following facts were admitted or proved. On March 23, 1901, Albert Boorer, who was under eighteen years of age, was in the employment for hire of the appellants, who are newspaper agents. From 6.30 A.M. to 10.15 A.M. he was employed for them at Merstham, and for the remainder of his time at Redhill railway station.

(1) The Shop Hours Act, 1895, merely increases the maximum penalty for a contravention of s. 4 of the Act of 1892 from 20*s.* to 40*s.*

Merstham is a village having a railway station two miles from Redhill. Boorer's duties while at Merstham were, first, to deliver papers in the district, and then to set up a stall at the railway station and sell newspapers there. This stall consisted of a board laid on trestles. No such notice as is mentioned in s. 4 of the Shop Hours Act, 1892, was exhibited at the stall at Merstham, but there was such a notice duly exhibited at the appellants' stall at Redhill station.

The appellants contended that Boorer was not employed in and about a shop at Merstham but at Redhill, where he had an opportunity of seeing the notice, that the stall at Merstham was not a shop within the meaning of the Shop Hours Act, 1892, as defined by s. 9 of that Act, and that, even if it was a shop, it was not a shop in and about which Boorer was employed.

The respondent contended that the stall at Merstham was a shop within the meaning of the last-mentioned Act; that if an employer had two shops even in the same town he was required by the Acts to exhibit a notice at each of them; that the stall at Merstham was none the less a shop because Boorer was not employed there for the whole of his time, the definition in the Act of 1892 not requiring that he should be so employed in order to bring the stall within the Act.

The justices were of opinion that the stall at Merstham constituted a shop within the meaning of the Shop Hours Acts, 1892 to 1895, and convicted the appellants and imposed a fine of 1*s*.

The question of law for the opinion of the Court was whether on these facts the justices were warranted in holding that the stall at Merstham was a shop within the meaning of the Shop Hours Acts, 1892 to 1895.

R. B. D. Acland, for the appellants. The boy was not employed about a shop at Merstham; his real employment was about a stall or shop at Redhill, where the notice required by s. 4 was displayed; it was a mere incident of his employment at Redhill that for a portion of the morning he had to sell newspapers at Merstham. The board on trestles was not a

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shop within the meaning of s. 4 of the Act; that section must be read in conjunction with s. 9, which defines "shop" to mean a stall "unless the context otherwise requires." Sect. 4 deals with permanent structures or shops "in" which young persons are employed, and it cannot extend to a mere temporary erection of a board and trestles "in" which employment is impossible.

A. Glen, for the respondent. The justices have, so far as the question was one of fact, found that this stall was a shop within the meaning of the Shop Hours Acts; it is therefore a shop to which some, at any rate, of the provisions of the Act of 1892 apply. The stall would clearly be a shop within the meaning of s. 3, which regulates the hours of employment "in or about" a shop; and the difficulty raised upon the language of s. 4, which requires the notice to be kept exhibited "in" the shop, is imaginary rather than real; the section would be complied with by affixing the notice "on" the board.

LORD ALVERSTONE C.J. I am of opinion that this particular conviction cannot stand; but in so holding I desire to say nothing which can give rise to the impression that we are deciding that this stall may not be a shop for some of the purposes of the Act. For example, if an employer were to employ a lad at such a stall for more than seventy-four hours, including meal times, in one week, I think, subject to any argument that might be addressed to me upon the point, that the structure would be clearly a stall and a shop for the purpose of s. 3, which limits the hours of employment of young persons in or about shops. But we have to consider the meaning of the word "shop" as used in s. 4, which section must be read in connection with the interpretation given to the word in s. 9, and it is important to notice that by the latter section the definition of "shop" as meaning (inter alia) "stalls . . . . in which assistants are employed for hire" is limited by the introductory words "unless the context otherwise requires." I think, apart from the particular case, that the word "shop," as used in s. 4, applies to structures which are in the nature of

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Lord Alverstone C.J.

permanent structures, and not to a mere temporary erection of a board and trestles such as existed here. In the present case the boy was really employed at Redhill; his employment at Merstham only lasted for three and three-quarter hours in the morning, during part of which time he was distributing newspapers to subscribers living in the village, so that the whole period of his absence from Redhill was not filled up by his employment of selling papers from a board and trestles at Merstham station. In my opinion, it would be a ridiculous construction of the Act if we were to hold that, for the purpose of exhibiting a notice under the Act, this board and trestles constituted a stall, and therefore became a shop, for all the purposes of the Act. No doubt the structure was a stall for some purposes, but the context clearly excludes such a construction as that contended for by the respondent. It is not consistent with the facts of the case to hold that the boy's employment was at this stall; he was only there for a portion of a day, and his real employment was at Redhill, where a notice under s. 4 was properly displayed upon the bookstall on the platform. I think, therefore, that this conviction should be quashed.

DARLING and CHANNELL JJ. concurred.

Conviction quashed.

Solicitors for appellants: *Bircham & Co.*

Solicitors for respondent: *Harvey & Varley, for Weeding, Kingston-on-Thames.*

W. J. B.

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Nov. 26, 27.

BLACKBURN AND ANOTHER *v.* LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY.

Ship—Bill of Lading—Exceptions—Peril of the Seas occasioned by Negligence—Intentional letting in of Sea-water—Negligent Mistake.

Goods were shipped under a bill of lading which excepted loss or damage arising from peril of the seas or navigation, whether arising from the negligence, default, or error in judgment of the engineers or otherwise howsoever. When the ship was off the port of discharge the engineer, intending to fill the ballast tank with water for boiler use whilst discharging, opened the sea-cock, and then by mistake opened the valve of the tank in which the goods were being carried instead of the valve of the ballast tank, and the goods were damaged by sea-water:—

Held, that the damage was caused by a peril of the seas arising from negligence of the engineer, within the exception, and that the shipowner was not liable.

COMMERCIAL CAUSE tried before Walton J. without a jury.

The action was brought to recover damages for injury to goods carried by the defendants for the plaintiffs by sea under a bill of lading.

The plaintiffs shipped a quantity of sugar on board the steamship *Tropic* for carriage by the defendants from Pernambuco to New York, under bills of lading which excepted "loss or damage resulting from any of the following perils (whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew, or otherwise howsoever), namely, . . . other peril of the seas, rivers, or navigation of whatever nature or kind soever."

A number of the bags of sugar were delivered by the defendants to the plaintiffs at New York in a damaged condition. These bags had been carried in the *Tropic's* deep tank, a water-tight compartment in the bottom of the vessel, which was a usual and proper place in which to carry the cargo. The damage was caused by an incursion of sea-water into the tank under the following circumstances: When the *Tropic* was outside Sandy Hook, the chief engineer, being

under the mistaken impression that she was going to Williamsburg Wharf to discharge her cargo, desired to fill No. 4 ballast tank with water for boiler use while discharging instead of taking in water at the wharf, where, according to his previous experience, it was contaminated with sewage. He, therefore, opened the sea-cock and intended to open the valve of No. 4 ballast tank, but by mistake opened the valve of the deep tank, with the result that the water ran into the deep tank where the bags of sugar were instead of into No. 4 ballast tank. The sea-cock was open from 11.30 A.M. on January 30 until 3 P.M. of the same day. The mistake was not discovered until 6 A.M. of January 31, and the water was then pumped out. The *Tropic* was not intended to go, and did not in fact go, to Williamsburg Wharf.

The damages were agreed at 1319*l.*

Carver, K.C., and *Bailhache*, for the plaintiffs. The defendants are liable for the damage to the cargo because they cannot bring the case within the exception in the bill of lading. This damage can only be brought within the exception if it is shewn to have been caused by a "peril of the seas, rivers, or navigation." It was not caused by a peril of the seas, because the sea-water was intentionally introduced into the ship, though by mistake it was introduced into the deep tank, and the incursion of sea-water was not an accident or peril at all. The damage was not caused by a peril of "navigation," because the introducing of the sea-water into the ship had nothing to do with the trim, or safety, or propulsion, or handling of the ship; it was brought into the ship for the purpose of the discharge of the cargo, and not for any purpose of navigation: *The Accomac* (1); *Canada Shipping Co.* v. *British Shipowners' Mutual Protection Association* (2); *Good* v. *London Steamship Owners' Association* (3); *Carmichael* v. *Liverpool, &c., Indemnity Association* (4); *The Ferro* (5); *The Glenochil* (6); *The Rodney*. (7) From those cases it clearly appears that this

(1) (1890) 15 P. D. 208.
(2) (1889) 23 Q. B. D. 342.
(3) (1871) L. R. 6 C. P. 563.
(4) (1887) 19 Q. B. D. 242.
(5) [1893] P. 38.
(6) [1896] P. 10.
(7) [1900] P. 112.

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was not a peril of navigation at all. Even if what the engineer did was an act of navigation, yet it was not a peril of navigation. Everything which may happen to be done by a person in charge of a ship is not necessarily a peril of navigation.

Horridge, K.C., and *Maurice Hill*, for the defendants. This loss was caused by a peril of the seas or by a peril of navigation, and in either case the defendants are protected by the exception in the bill of lading; and it was occasioned by reason of the negligence of a person for whose negligence the defendants are not responsible by reason of the provisions of the exception. The effect of that which was done by the engineer was that a hole was made in the ship which would let sea-water into the cargo, and when once made that was a peril of the seas: *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (1); *The Xantho* (2); *Hamilton* v. *Pandorf.* (3) The accidental admission of sea-water into the cargo while the vessel is at sea is a peril of the seas or a peril of navigation, and it is immaterial by whom or for what purpose the act is done which results in letting in the sea-water. If it is the result of negligence, the shipowner is not responsible by reason of the exception. This case is exactly the same in principle as *Carmichael* v. *Liverpool, &c., Indemnity Association* (4); and this loss was occasioned by a peril of "navigation": *The Southgate* (5); *The Cressington.* (6)

Carver, K.C., in reply. All the cases shew that, to be a peril of the seas or of navigation, the incursion of sea-water must be accidental, and that the intentional letting in of sea-water, even if negligent, is not a peril of the seas or of navigation.

WALTON J. In this case the plaintiffs shipped a quantity of sugar at Pernambuco for New York on the defendants' ship *Tropic* under bills of lading, and the plaintiffs were the holders of the bills of lading and the receivers of the cargo. When the ship was on her way to New York and was outside Sandy

(1) (1887) 12 App. Cas. 484.
(2) (1887) 12 App. Cas. 503.
(3) (1887) 12 App. Cas. 518.
(4) 19 Q. B. D. 242.
(5) [1893] P. 329.
(6) [1891] P. 152.

Hook, the chief engineer intended to fill the No. 4 ballast tank with sea-water for boiler use while discharging the cargo at New York. He opened the sea-cock which admitted the sea-water into the vessel; the water ought then to have been admitted into the No. 4 ballast tank; if that had been done the vessel would still have been perfectly tight; instead, however, of admitting the water into that tank, the engineer by mistake opened the wrong valve and let the water into the deep tank where the sugar was, and the cargo of sugar was thereby damaged to the amount of 1319*l*. The plaintiffs in this action seek to recover that amount, and say that they are entitled to recover that sum as damages because the shipowners were bound by their contract to carry and deliver the cargo safely and failed to do so. The defendants, on the other hand, contend that the obligation to carry and deliver the cargo safely is subject to the exceptions contained in the bill of lading, among which there is an exception in respect of "loss or damage resulting from any of the following perils (whether arising from the negligence, default, or error in judgment of the . . . . engineers . . . . or otherwise howsoever) . . . . or other peril of the seas, rivers, or navigation of whatever nature or kind soever." The shipowners say that they are exempt because the case comes within that exception. Numerous cases have been cited, but I think that the law upon this question has really been cleared up and established by the three cases in the House of Lords: *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (1), *The Xantho* (2), and *Hamilton* v. *Pandorf* (3), of which I think that *Hamilton* v. *Pandorf* (3) is the example most applicable to the present case. It is to be noticed that in those three cases no question arose with regard to a negligence clause, for in those cases the shipowner was not exempt from liability for damage arising from negligence of the crew. As I understand the law, where there is not a negligence clause, the shipowner is bound absolutely to deliver the goods safely, subject to the exception of perils of the seas and any other exceptions contained in

(1) 12 App. Cas. 484. (2) 12 App. Cas. 503.
(3) 12 App. Cas. 518.

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the bill of lading. If he fails to carry the goods safely, but the loss is occasioned by one of the excepted perils, then primâ facie he is not liable. In the cases before *Hamilton* v. *Pandorf* (1) the contract of the shipowner was not only to carry the goods safely, subject to the excepted perils, but, further, to use all due care and diligence to deliver safely, and therefore the exceptions relieved him from his absolute obligation, but not from the obligation to use due care and diligence, if there was no negligence clause. If the shipowner failed to use due care and diligence, though he was exempt by the exception from his absolute obligation, yet he was not exempt from liability for breach of his contract to use due care and diligence, if there was no negligence clause; and therefore, if a loss was occasioned by want of due care and diligence, the shipowner was liable even if the loss was occasioned by an excepted peril. In the present case there is what is called a negligence clause, and the shipowner is exempt from liability for loss occasioned by peril of the seas though caused by negligence, and therefore we have not to consider the liability for want of due care and diligence. The only question is whether the loss was occasioned by a "peril of the seas or navigation." If it was, then the shipowner is protected by the exception, although the loss was caused by the negligence of his servant. Therefore, we have not really to consider what is a fault or error of navigation, but only whether the loss was occasioned by a peril of the seas or navigation. Now, it is perfectly true, as was pointed out by counsel for the plaintiffs, that, to bring the case within the exception, there must in the first place be an accident, by which I understand that the loss must be something which *might*, and not necessarily *must*, follow. That was pointed out by Lord Halsbury L.C. in *Hamilton* v. *Pandorf* (2), where he said: "I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden

(1) 12 App. Cas. 518. (2) 12 App. Cas. 518, 524.

vessel sailing through certain seas." Therefore, things which must necessarily happen cannot be perils of the seas. Then, it must be not only an accident, but an accident of the seas, as was pointed out by Lord Herschell in *The Xantho*. (1)

It seems to me, however, to be a fallacy to say that because the loss was caused by mistake or neglect on the part of a servant it was therefore not an accident. The loss was obviously a thing which *might*, but not necessarily *must*, happen. In the ordinary and proper sense, damage arising from the negligence of a servant is an accident or casualty. It seems to me, then, that this loss did arise from an accident. Was it an accident of the seas? As I understand the judgments of the learned Lords in *Hamilton* v. *Pandorf* (2) and *The Xantho* (3), one of the perils of the seas is that, if the ship is not kept tight, the sea-water will come in. If by some accident the ship is not kept tight and the water comes in and damages the cargo, that is damage by an accident or peril of the seas. In my opinion, these considerations afford a simple answer to the question in this case. The engineer intentionally opened the sea-cock, but the vessel still remained perfectly tight. The sea-water could not come into the carrying part of the vessel, nor sink the vessel; it was the same as if the water had been let into the ballast tank, in which case the ship would have remained perfectly tight. That being the position of things, the engineer, entirely by a mistake which was probably an act of negligence, opened a valve by which the sea-water was let into the carrying part of the ship, and then the ship was no longer tight. The sea-water then damaged the cargo which was in the carrying part of the ship. I cannot distinguish this case from the case in which a port was accidentally left open by negligence and the sea-water was thereby let into the ship: *Carmichael* v. *Liverpool, &c., Indemnity Association*. (4) In either case an opening was made accidentally by mistake, and the ship then ceased to be tight. It seems to me that in either case the ship by negligence, by an accident, was exposed to the peril that, if the ship was not

(1) 12 App. Cas. 503, 509.
(2) 12 App. Cas. 518.
(3) 12 App. Cas. 503.
(4) 19 Q. B. D. 242.

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kept tight, the sea-water would come in; and that is essentially a peril of the seas, and a peril to which every ship is exposed while she is afloat. The damage or loss occasioned by that peril is within the exception in the bill of lading, and the ship-owner is exempt from liability. My judgment must, therefore, be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Walker, Son & Field, for Weightman, Pedder & Weightman, Liverpool.*

Solicitors for defendants: *Field, Roscoe & Co., for Thornely & Cameron, Liverpool.*

W. A.

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Nov. 7, 8.

SEALEY *v.* TANDY.

Licensing Acts—Public-house—Right of Licence-holders to request Person to leave Licensed Premises—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 18.

The occupier and licensee of licensed premises (not being an inn) has a right to request any person to leave whom he does not wish to remain upon his premises; his right is not limited to the case of persons who are drunken, violent, quarrelsome, or disorderly within the meaning of s. 18 of the Licensing Act, 1872.

CASE stated by a metropolitan police magistrate, who had dismissed a charge of assault preferred by the appellant against the respondent.

The appellant was the occupier and licensee of a public-house, which was licensed by the justices for the sale by retail of all intoxicating liquors, but which was not an inn for the reception of travellers. On February 25, 1901, the respondent, who was not a traveller, entered the appellant's licensed premises about three o'clock in the afternoon. The appellant had on several former occasions ejected the respondent from the premises for using offensive language thereon and behaving in a disorderly manner. The appellant stated that he had forbidden the respondent the house; that on the afternoon in question the respondent came in half drunk and threatened to fight him, and on being requested to leave struck at the

appellant, who, on going to eject him, was violently kicked by the respondent. The appellant further said that the respondent was not fit to be served because of his previous conduct more than anything, and that he went to eject him because of his bad behaviour on previous occasions. The police constable who took the respondent into custody said that he was not drunk. A witness named Pullen said that the respondent used very foul language when he came in.

The learned magistrate was of opinion that the evidence of the appellant and his witness shewed that the appellant had acted with undue haste in proceeding to eject the respondent immediately upon his refusal to leave the house, and without waiting until he had behaved in a violent or disorderly manner; he found as a fact that at the time the respondent entered the appellant's premises he was neither drunken, nor violent, nor quarrelsome, nor disorderly, and he was satisfied that the appellant sought to eject the respondent solely on account of the respondent's conduct in the house upon former occasions, and that the kick had been given in the course of a struggle so initiated by the appellant and while the respondent was resisting forcible expulsion.

On these findings the learned magistrate dismissed the charge, holding that under the circumstances disclosed in the case the appellant's right to forcibly eject the respondent was dependent upon and controlled by s. 18 of the Licensing Act, 1872, and that on the authority of *Dallimore* v. *Sutton* (1) the appellant had no right to forcibly eject the respondent on his refusing to leave when required, unless at the time of such requirement the respondent was either drunken, violent, quarrelsome, or disorderly within the meaning of that section, and that the respondent was therefore entitled to resist the appellant when seeking to forcibly eject him.

The question of law for the opinion of the Court was whether the learned magistrate was right in so holding, or whether the appellant was entitled to require the respondent to leave the licensed premises and to eject the respondent after he had refused to leave the same, although the respondent

(1) (1898) 62 J. P. 423.

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was not at the time of such requirement either drunken, violent, quarrelsome, or disorderly.

Danckwerts, K.C. (*Bruce Williamson* with him), for the appellant. The learned magistrate was wrong. The case of *Dallimore* v. *Sutton* (1), upon which he based his decision, is not in point; that case only decided that under s. 18 of the Licensing Act, 1872, a man could not be convicted of refusing to quit licensed premises unless he came within the category of persons described in the section. A person has no common law right to be in a licensed house, as distinguished from an inn, if the licensee objects to his being there. This is recognised in the case of *Reg.* v. *Armagh Justices* (2), where Holmes J. held that the proprietor of a public-house licensed for the sale of intoxicating liquor on or off the premises was under no legal obligation to supply reasonable refreshment to all comers. Even in the case of an inn, the obligation upon the licensee to receive guests is limited to travellers, and the character of traveller may itself be lost: *Lamond* v. *Richard*. (3) In the present case it is found as a fact that the respondent was not a traveller. The appellant had the same right as an ordinary shopkeeper to get rid of an undesirable customer. [He also cited *Howell* v. *Jackson* (4); *Reg.* v. *Rymer*. (5)]

The respondent did not appear.

Cur. adv. vult.

Nov. 8. LORD ALVERSTONE C.J. This was a case stated by a metropolitan police magistrate who had dismissed a summons for assault, because he considered that the proceedings out of which the assault arose were occasioned by the appellant (who is the occupier and licensee of a public-house), requesting the respondent to leave the house, and on his refusal attempting to forcibly eject him, and that therefore whatever followed he could not entertain the proceedings for assault. The learned magistrate seems to have thought that the rights of a publican to request a person to leave his premises depended

(1) 62 J. P. 423.
(2) [1897] 2 I. R. 57.
(3) [1897] 1 Q. B. 541.
(4) (1834) 6 C. & P. 723; 40 R. R. 844.
(5) (1877) 2 Q. B. D. 136.

solely on s. 18 of the Licensing Act, 1872, and that, unless the person was drunk, violent, quarrelsome, or disorderly at the time, he had no right to make such a request. We think that he has overlooked two important elements of the case to which our attention was called during the argument: in the first place, that this house was not an inn, but only a public-house—a fully licensed house; and, secondly, that the person who was turned out, or attempted to be turned out, was not a traveller. These distinctions have been recognised in many cases, not only in *Reg.* v. *Armagh Justices* (1), but also in *Reg.* v. *Rymer* (2), and in other cases cited to us. In our opinion the distinctions are well founded, and we think that the occupier of a public-house has a right to request a person to leave, if he does not wish him to remain upon his premises. We also think it right to say, and it is quite clear that the magistrate was of the same opinion, that there was nothing unjustifiable in any sense in the conduct of the appellant, because the man who was requested to leave was one of a gang of men who had been disorderly and had given trouble. But we do not base our judgment on that ground. We think that the appellant was right in his contention that, except in the case of a traveller at an inn, the licensee or occupier of licensed premises has a right to request a person to leave. This case must, therefore, go back to the magistrate in order, if necessary, that the question of assault may be tried. The objection which he took was not well founded, and the appeal must be allowed.

DARLING J. I am of the same opinion. It seems to me that there is, and always has been, a very great difference between the old form of inn and the modern public-house, or between the old form of inn and what was simply an alehouse. In a passage in the judgment of Holmes J. in *Reg.* v. *Armagh Justices* (1) it is said that the English inn was coeval with English literature. I have no doubt that the learned judge was thinking of the inn as described in Chaucer, and perhaps as described by Dr. Johnson. I could not help remembering, when I heard that, the passage in which Dr. Johnson said that

(1) [1897] 2 I. R. 57. (2) 2 Q. B. D. 136.

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one of the characteristics of an inn was that you were made welcome, and that the more noise you made, the more trouble you gave, and the more good things you called for, the more welcome you were; having made that statement, he proceeded to repeat, as Boswell says, with great emotion, a well-known verse. This particular person did not make himself welcome, because he went beyond what was described as "the more noise you make, the more trouble you give, and the more good things you call for." He was a person who belonged to a disorderly gang, who would not be a good customer, as the publican very well knew, and the latter acted, therefore, upon his right, and I think his undoubted right, to say, "I am quite ready to see some customers, even noisy customers, and I serve them, but you are the kind of customer who not only makes a noise, but will do me no good, and I will not serve you. I have the choice, like other shopkeepers, and I shall not serve you."

It seems to me that in acting as he did the appellant was acting for the public advantage, because the other persons who frequented the place might very well have complained if he were to allow a person, who to his knowledge was a member of a disorderly gang, to frequent his premises. If he allowed one of a gang to frequent it, he must allow them all, and by allowing such a gang to frequent the house he would undoubtedly endanger his licence. I think, therefore, that he was acting, not only well within his rights, but in the public interest, when he told the respondent that he would not allow him to remain there, and that the respondent ought instantly to have left the premises.

CHANNELL J. I agree.

Appeal allowed.

Solicitors for appellant: *Maitlands, Peckham & Co.*

W. J. B.

GOODRICH *v.* TOWN CLERK OF GREAT GRIMSBY.

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Nov. 8.

Parliament — Registration — Borough Vote — Occupiers' List — Description of Nature of Qualification — Power of Revising Barrister to Amend — Effect of Declaration — Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 24.

Where a voter has made a declaration under s. 24 of the Parliamentary and Municipal Registration Act, 1878, in order to correct an erroneous description of his qualification in the list, the revising barrister has power to make an amendment which would change the description of the qualification as it appears in the list.

CASE stated by the revising barrister for the borough of Great Grimsby.

The name of Robert Mitchell appeared on the occupiers' list (Division 1) for a dwelling-house at 84, Watkin Street, and was duly objected to on the ground that he had not occupied the qualifying premises for the full period of twelve months prior to July 15. The objection was admitted to be good, and the name was expunged from the list by the revising barrister.

A "statutory declaration for correcting misdescription in list," made before a justice of the peace, had been duly filed with the town clerk of Great Grimsby. In it Robert Mitchell declared that he was the person referred to in Division 1 of the occupiers' list in an entry in the following terms :—

Name as described in List.	Place of Abode as described in List.	Nature of Qualification as described in List.	Description of Qualifying Property.
Mitchell, Robert.	84, Watkin Street.	Dwelling-house.	84, Watkin Street.

He further went on to declare that his correct name and place of abode, and the correct particulars respecting

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his qualification, were and ought to be described as follows:—

Correct Name.	Correct Place of Abode.	Correct Nature of Qualification.	Correct Description of Qualifying Property.
Mitchell, Robert.	Scartho.	Yard and Stables.	Back of 84, Watkin Street.

It was proved to the satisfaction of the revising barrister that Robert Mitchell had for the whole of the twelve months prior to July 15 occupied the yard and stables mentioned in the declaration and adjoining the dwelling-house in question, which yard and stables were of the requisite value, and it was submitted that he ought to correct the list in accordance with the suggested amendment and substitute "yard and stables" for the former qualification of "dwelling-house." Notwithstanding certain dicta in the cases of *Foskett* v. *Kaufman* (1) and *Plant* v. *Potts* (2), the revising barrister failed to see that in the circumstances of this particular case the declaration could be treated as the correction of a "misdescription," or that it dispensed with the necessity for a formal claim, with its incidents of timely notices to overseers, publication, and possible challenge. He accordingly held the declaration to be insufficient and refused to accept it, and expunged the name of Robert Mitchell from the list. (3)

J. Percival Hughes, for the appellant. The revising barrister was wrong. The effect of a declaration under s. 24 is to give

(1) (1885) 16 Q. B. D. 279.

(2) [1891] 1 Q. B. 256.

(3) By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 24, "Any person who is entered on any list of voters for a parliamentary borough or any burgess list, subject to revision under this Act, for a municipal borough, and whose name or place of abode or the nature of whose qualification or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list, may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration . . . . If the declaration is sent as aforesaid in due time . . . . the revising barrister shall receive the declaration as evidence of the facts declared to . . . ."

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a revising barrister power to make an amendment altering the description of the qualification as it appears in the list. This was clearly the opinion of the Court of Appeal in *Foskett* v. *Kaufman* (1), although, as there was no declaration in that case, the opinion cannot be regarded as an authoritative decision on the point. It is to be observed that in the example given in the form for correcting a misdescription in the list (Registration Order, 1895, Form M) the place of abode, the nature of the qualification, and the description of the qualifying property are all changed. In *Lord* v. *Fox* (2) it is true that the Divisional Court held that there was no power to make an amendment which would alter the nature of the qualification, and that a declaration under s. 24 had been made in that case; but it is clear that the effect of the declaration was not brought to the notice of the Court during the argument, and was not considered in the judgment. [He also cited *Plant* v. *Potts*. (3)]

LORD ALVERSTONE C.J. I am of opinion that this appeal should be allowed. In the occupiers' list the nature of the appellant's qualification had been erroneously stated as "dwelling-house" when it should have been "yard and stables," which, as appears from the declaration, was the correct description of the qualification. It has, I think, been decided in the Court of Appeal that the effect of a declaration under s. 24 of the Act of 1878 is to give the revising barrister power to make an alteration which he could not otherwise have made. And it is not immaterial to notice that under the section these declarations are open free of charge to public inspection, that copies of them must be delivered on application and on payment of a small charge, and that a penalty attaches to the making of a false declaration. In *Foskett* v. *Kaufman* (1) no declaration had been made under s. 24, and for that reason the Court of Appeal felt it necessary to affirm the decision of the Divisional Court against the power of the revising barrister to alter the description of the qualification. In the course of his

(1) 16 Q. B. D. 279. (2) [1892] 1 Q. B. 199.
(3) [1891] 1 Q. B. 256.

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judgment Lord Esher says (1): "If the voter acts under s. 24, then the revising barrister can alter the overseers' list according to the declaration, but if the voter, instead of availing himself of the power given by s. 24, inadvertently waits until the holding of the revision court, and then goes before the revising barrister and offers proof of his qualification, the revising barrister has no power, any more than he had before, to alter the description of the qualification as it appears in the list." It is clear, therefore, that this particular point was considered in that case by the Court of Appeal, who came to the conclusion that, there having been no declaration, there could be no amendment which would alter the nature of the qualification, and further expressed a distinct opinion that, where a declaration under s. 24 was made, the revising barrister would have such a power of amendment. Our attention has been very properly called to the case of *Lord* v. *Fox* (2), in which Lord Coleridge C.J., after drawing attention to s. 28, sub-s. 13, of the Act of 1878, which prohibits the revising barrister from changing the description of the qualification except for the purpose of more clearly and accurately defining it, came to the conclusion that the amendment required would change the description of the qualification otherwise than for the purpose of more clear and accurate definition, and held that the revising barrister had no power to make the amendment. In that case there had been a declaration under s. 24, and if the decision is an authority against anything that I am now saying, I can only say that it is inconsistent with the view taken by the Court of Appeal in *Foskett* v. *Kaufman*. (3) But it is important to observe that in *Lord* v. *Fox* (2) the point as to the effect of the declaration was not brought prominently to the attention of the Court.

DARLING J. I am of the same opinion.

CHANNELL J. I agree. I desire to express no opinion on the question whether the amendment could have been made,

(1) 16 Q. B. D. at p. 288. (2) [1892] 1 Q. B. 199.
(3) 16 Q. B. D. 279.

had there been no declaration: the point was not argued; but at present I think that there would have been no power to make it. I have always thought that, where a declaration under s. 24 can be made, it has the effect by necessary implication of enlarging the revising barrister's powers of amendment; when such a declaration is made the revising barrister ought, I think, to follow it. Cases frequently arise where the necessary amendment cannot be made except by means of a new claim, the time for making which has passed, and in such cases the voter is allowed to correct the omission by making a statutory declaration under s. 24. This view is supported by the decisions of the Court of Appeal in *Foskett* v. *Kaufman* (1) and *Plant* v. *Potts* (2), although it is of course true that the observations of the learned judges were in the nature of dicta, as in neither of those cases was there a declaration. In *Lord* v. *Fox* (3), which is the only case in which there was a declaration, the decision is no doubt right as far as it goes, but nothing was said as to the effect of the declaration; and that case is, therefore, no authority against our present decision.

Appeal allowed.

Solicitors for appellant: *Routh, Stacey & Castle, for H. Thompson & Sons, Grantham.*

(1) 16 Q. B. D. 279. (2) [1891] 1 Q. B. 256.
(3) [1892] 1 Q. B. 199.

W. J. B.

1901

Nov. 8;
Dec. 16.

KIRKHOUSE *v.* BLAKEWAY.

Parliament—Franchise—Disqualification—Maintenance of Voter's Wife in Pauper Lunatic Asylum—"Medical Assistance"—Medical Relief Disqualification Removal Act, 1885 (48 & 49 *Vict. c.* 46), *s.* 2.

Where upon the revision of the lists of voters it appears that a voter or claimant has during the qualifying period received relief which is of the nature both of medical relief and ordinary relief, it is a question of fact for the revising barrister as to what was the real character of the relief and which kind of relief was merely incidental to the other.

The wife of a claimant had been removed as a dangerous lunatic to a pauper lunatic asylum, and had been detained there for two years at the expense of the ratepayers, no contribution towards her maintenance being made by her husband. The revising barrister held that the permanent maintenance of a lunatic was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and was not "medical assistance" within the meaning of the Medical Relief Disqualification Removal Act, 1885:—

Held, that the finding was one of fact that the relief, which had been in the first instance medical, had become ordinary relief, and that there was evidence to support the finding.

CASE stated by the revising barrister for the city of Gloucester.

The appellant claimed to have his name inserted on the occupiers' list (Division 1) for the parish of Gloucester. He was qualified in all respects to be placed on the list, except for the fact that his wife had been during the whole of the qualifying period maintained out of the poor-rate of the parish as a pauper patient of the Gloucester County Lunatic Asylum, to which she had been removed in September, 1899, under a justice's order made upon a certificate signed by a medical officer of the Gloucester Union; she was described in the order as "dangerous." The sum of 9*s.* a week was paid to the county authority by the overseers of Gloucester out of the poor-rate for her maintenance, and it was to be taken that nothing had been contributed by the claimant towards her maintenance. It was contended on behalf of the claimant that the maintenance of his wife in the asylum was medical assistance within

the meaning of the Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict. c. 46), and that he was not thereby deprived of his right to be registered as a parliamentary voter or as a burgess. The revising barrister thought that the permanent maintenance of a lunatic or imbecile was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and that such maintenance was not medical assistance within the meaning of the statute. He thought it analogous to the maintenance of a disabled or crippled pauper in the workhouse, and that such medical assistance, if any, as was rendered to the patient was an incident additional to the maintenance. He therefore rejected the claim.

The claimant appealed.

H. Terrell, K.C., and *J. Percival Hughes*, for the appellant. The maintenance of the appellant's wife in the lunatic asylum was medical relief within the meaning of the Medical Relief Disqualification Removal Act, 1885. (1) The wife was removed, not for the relief of the appellant because he was unable to maintain her, but for reasons of public safety, because she was dangerous. It is true that the wife had been two years in the asylum, but there is no sound distinction to be drawn between permanent and temporary detention in a lunatic asylum, for the bodily maintenance which she received was a mere adjunct to the medical assistance which it was the first object of those who ordered her removal to afford her. It is not a case of parochial relief at all, for, although she was in fact kept at the expense of the poor-rate, it was not because her husband was unable to maintain her. Relief received in a hospital does not lose the character of medical relief because the patient is also maintained there: *McCreery* v. *Hanrahan*. (2) Assuming that a distinction can be drawn between the medical assistance and

(1) By 48 & 49 Vict. c. 46, s. 2, "Where a person has in any part of the United Kingdom received for himself, or for any member of his family, any medical or surgical assistance, or any medicine at the expense of any poor-rate, such person shall not by reason thereof be deprived of any right to be registered or to vote" as a parliamentary voter, or at any municipal election, or as a burgess.

(2) (1885–93) Lawson's Registration Cases, p. 256.

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maintenance, no demand for a contribution for the wife's maintenance was ever made upon the appellant.

[They also cited *William Gray's Case.* (1)]

The respondent did not appear.

Dec. 16. The judgment of the Court (Lord Alverstone C.J., Darling and Channell JJ.) was read by

CHANNELL J. This was an appeal on a case stated by the revising barrister for the city of Gloucester, and the question we have to consider is whether the barrister was right in disallowing the claim of the appellant on the ground of his having received "parochial relief or other alms which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament." (2) The appellant's wife had been maintained for a period of about two years in the county lunatic asylum at the expense of the union, and he had not paid anything towards her maintenance and support. It was contended on behalf of the appellant that this was medical relief within the meaning of the Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict. c. 46). The revising barrister states that he thought that the permanent maintenance of a lunatic or imbecile, which was this case, was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and that such maintenance was not medical assistance within the meaning of the said statute. He thought it analogous to the maintenance of a disabled or crippled pauper in the workhouse, and that such medical assistance, if any, as was rendered to the patient was an incident additional to the maintenance. We think that this is a finding of fact and that there was evidence to support it, and that we cannot and ought not to disturb it.

It seems to us that in all cases in which relief is given, which is more or less of the nature both of medical relief and ordinary relief, a question of fact arises for the decision of the revising barrister. When in consequence of illness (and insanity is undoubtedly illness) a voter or claimant or a member of his

(1) (1860) Wolf. & Br. 174.

(2) See 2 & 3 Will. 4, c. 45 (Reform Act, 1832), s. 36, applied to counties by 30 & 31 Vict. c. 102 (Representation of the People Act, 1867), s. 40.

family whom he is bound to support is given medical relief, it is not the less medical relief within the statute because a certain amount of ordinary sustenance is given as well as medicine. And so, where a pauper in a workhouse is removed to the infirmary in consequence of his illness, he would, whilst in the infirmary, still be receiving relief other than medical relief within the meaning of the statute. It would be a question of fact for the revising barrister in all such cases what the real character of the relief was and which kind was merely incidental to the other. Where a member of a voter's or claimant's family is attacked with insanity and is in consequence removed to an asylum at the expense of the union, we should have no doubt, and the revising barrister in this case seems to have had no doubt, that the case was in the first instance one of medical relief. But when the insane person, being a person for whose support the voter or claimant is liable, remains permanently in the asylum and no payment is made by the voter or claimant, we think a question of fact arises as to whether the relief has not become ordinary relief as distinguished from medical. When any payment is made, even although it is not as great as the cost to the union of the maintenance of the lunatic in the asylum, the inference might fairly be drawn that there is no ordinary relief; but this is for the revising barrister. Where the maintenance has continued for a long time without any payment whatever, we cannot say that the revising barrister is wrong in coming to the conclusion that the voter or claimant is in receipt of relief other than medical relief.

There appear to be no authorities in this country bearing on this question, but the view we have expressed appears to be that taken by the Courts in Ireland: see *Holland* v. *Porter* (1) and *Crossan* v. *Holland*. (2) The appeal must be dismissed; but, as there was no appearance of the respondent, there will be no costs.

Appeal dismissed.

Solicitors for appellant: *Ayrton, Biscoe & Barclay.*

(1) (1898) Lawson's Registration Cases, p. 220.

(2) (1899) Lawson's Registration Cases, p. 304.

W. J. B.

1901
Nov. 21, 22.

PIDGEON, APPELLANT; THE GREAT YARMOUTH WATERWORKS COMPANY, RESPONDENTS.

Water—Supply—Waterworks Company—Special Act—"Domestic Purposes"—Purposes of "Trade, Manufacture, or Business"—Boarding-house Keeper.

A waterworks company's special Act provided that they should, at the request of occupiers of houses, furnish them with a supply of water for "domestic purposes" at specified rates; that a supply for domestic purposes should not include a supply for any "trade, manufacture, or business," and that it should be lawful for the company to supply any person with water for other than domestic purposes upon such terms and conditions as should be agreed upon between them.

The occupier of a dwelling-house carried on the business of a boarding-house keeper therein, receiving persons to board and lodge who used the water of the company. Water was only used in the house for cleansing, cooking, drinking, and sanitary purposes:—

Held, that, having regard to the use of the water in the house, the occupier was entitled to demand a supply of water at the rates specified in the Act for a supply for "domestic purposes."

CASE stated, under the Summary Jurisdiction Acts, by two justices of the peace for the borough of Great Yarmouth.

The following material facts were stated in the case:—

The respondents appeared before the justices to answer an information preferred by the appellant charging that they had, contrary to the provisions of their special Act, within the last six months, refused to furnish to him a supply of filtered water for domestic purposes in his dwelling-house in the borough within the limits of the Act, he being a person entitled to demand such a supply, and having requested the respondents to furnish him therewith, and paid or tendered to them the rates for the same.

Sect. 30 of the special Act (the Great Yarmouth Waterworks Act, 1853) provides that the company "shall, at the request of the owner or occupier of any house or part of a house . . . . or on the application of any person who . . . . shall be entitled to demand a supply of filtered water for domestic purposes, furnish to such owner occupier or other person a sufficient supply of such water for domestic use" (at rates therein specified).

Sect. 32 provides that "a supply of water for domestic purposes shall not include a supply of water for cattle, or for horses or washing carriages where such horses or carriages are kept for hire or by common carriers, nor a supply of water for any trade, manufacture, or business whatsoever, or for watering gardens or any ornamental purposes whatsoever."

Sect. 34 provides that "it shall be lawful for the company to supply any person with water for other than domestic purposes for such remuneration, and upon such terms and conditions, as shall be agreed upon between the company and the persons desirous of having such supply of water."

The penalties sought to be recovered by the appellant are made payable by s. 43 of the Waterworks Clauses Act, 1847, one of the statutes incorporated in the special Act. (1)

Paragraph 6 of the case was as follows: At the hearing it was proved or admitted, and the justices found as a fact, that the appellant was the occupier of the dwelling-house referred to in the information, into which there was only one communication or service pipe from the respondents' main, and that he had requested the respondents to furnish him with a supply of water for domestic purposes in that dwelling-house, and that he had tendered to the respondents the rates for the same, and that the respondents, alleging that the appellant used the water for his business of a boarding-house keeper, had refused to comply with that request, but had supplied water by meter; also that the appellant's house contained ordinary sitting-rooms, ten bedrooms, two water-closets, but no fixed bath, and that water was only used in the house for cleansing, cooking, drinking, and sanitary purposes.

Paragraph 7: It was proved or admitted, and the justices found as a fact, that the appellant received into his house for reward persons to board and lodge therein, who used the respondents' water, and that the appellant carried on therein

(1) Sect. 43 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), provides: "If, except when prevented as aforesaid, the undertakers . . . . neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of ten pounds. . . . ."

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the business of a boarding-house keeper, and used the respondents' water for the purposes before stated in connection therewith, the appellant and his wife and family also residing upon the premises.

The justices were of opinion that, where the householder carried on the business of a boarding-house keeper in his house, and water was used for any purpose whatsoever therein in connection with the business other than for the domestic purposes of the householder and his family, the respondents were entitled to treat that user as a user for business purposes, notwithstanding that the user was confined to the purposes mentioned in paragraph 6 of the case, and were only bound to supply water for such purposes by agreement.

The justices dismissed the information accordingly.

The question for the opinion of the Court was whether they had come to a correct determination and decision in point of law.

F. Low, for the appellant. The use of the water in the appellant's house was a use for "domestic purposes" only, and not a use for any "trade, manufacture, or business" within the meaning of the waterworks company's special Act. The supply may be for domestic purposes even though the house be used for public purposes, as in the case of a workhouse: *Liskeard Union* v. *Liskeard Waterworks Co.* (1) In *Barnard Castle Urban District Council* v. *Wilson and Others* (2) Buckley J. held that a supply of water for a swimming bath at a school was a supply for domestic purposes. In *Vestry of St. Martin's* v. *Gordon* (3) the question was whether clinkers, produced in the furnaces of boilers belonging to an hotel, and used to generate steam for supplying power for electric lighting, and for warming and cooking, and other purposes of the hotel, were refuse of a "trade, manufacture, or business" within the meaning of s. 128 of the Metropolis Management Act, 1855, and the Court of Appeal held that they were not. That decision illustrates that the mere fact of a business being

(1) (1881) 7 Q. B. D. 505. (2) (1901) 17 Times L. R. 754.
(3) [1891] 1 Q. B. 61.

carried on on the premises does not conclude the matter: see judgment of Lord Esher M.R. (1) [He also referred to *Smith* v. *Müller* (2)]

Holman Gregory, for the respondents. This is really a question of fact, and it has been found by the magistrates in favour of the respondents. Paragraph 7 of the case finds that the appellant was carrying on the business of a boarding-house keeper for profit, and that he used the water for the purposes of his business. If he supplies it for the purposes of his lodgers, to be used for baths, cooking food, &c., he is using it for the purposes of his business. There is no difference in this respect between an hotel and a boarding-house, and it can hardly be disputed that an hotel-keeper is carrying on a business. The cases which have been cited were decided upon different statutes, and do not apply here. In *Barnard Castle Urban District Council* v. *Wilson and Others* (3) the governors of the school were not carrying on a trade or business for profit; the school was a charity school. On the true construction of s. 32 of the waterworks company's special Act, it was intended that a supply of water such as this should not be considered a supply for domestic purposes.

F. Low replied.

Cur. adv. vult.

1901. Nov. 22. LORD ALVERSTONE C.J. The question raised in this case is, whether a person who keeps a boarding-house under the circumstances stated is entitled to have water supplied to him on the scale applicable to a supply for domestic purposes. The scheme of this Act and many similar Acts is that water for ordinary domestic purposes is paid for by the occupier on a scale based upon the annual value of the house. The question here arises upon s. 30 of the Great Yarmouth Waterworks Special Act of 1853, which provides: [His Lordship read s. 30.] In dealing with the matter it is necessary to bear in mind exactly what is found by the magistrates in the case which they have stated. [His Lordship read paragraph 7

(1) [1891] 1 Q. B. at p. 66. (2) [1894] 1 Q. B. 192.
(3) 17 Times L. R. 754.

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of the case.] I think that those findings of fact are conclusive in favour of the appellant. Under ordinary circumstances "domestic purposes," in my opinion, include the use of water for the ordinary purposes of domestic life by the inmates of the house, and it is found as a fact, in the present case, that the only persons who use the water are the inmates of the house —including the persons who board and lodge in the house. Although it is true that the appellant is carrying on the business of a boarding-house keeper, he is not using the water for the purposes of his business in any proper or just sense, or in any other sense than that the water has been supplied for the domestic use of inmates of the house. If the facts in any particular case shew either that the water is not being used for "domestic purposes," or that it is used by persons who are not inmates of the house—who are not living in the house in the sense of being in it as ordinary dwellers—different questions may arise. In the present case all I decide is that, where it is found that there is no use of the water except for domestic purposes, and that there is no use of it by any person who is not an inmate of the house in the ordinary sense, then the company are bound to supply according to the scale for domestic purposes. I am of opinion, therefore, that our judgment should be for the appellant.

DARLING J. I am of the same opinion, though I have arrived at it with a good deal of hesitation. It seems to me that difficulty may arise if it is attempted to extend our decision in this case to other cases in which the facts are different —for example, if it is attempted to extend it to the case of an inn or hotel. In the present case, where the water is used entirely for the domestic purposes of persons who are residing in the dwelling-house which has been turned into a boarding-house, I think that the supply is a supply for "domestic purposes" within the meaning of the statute. Waterworks Acts such as this have not attempted to make the occupier pay for water used for domestic purposes except in this way—the water rate is calculated, and the water is paid for, on the annual value of the house. That annual value would obviously

be increased if the house were turned from an unprofitable dwelling-house into a very profitable boarding-house, and in that rough and ready way the company would be remunerated. I think this case would be very different if the water were used for purposes which could not accurately be described as "domestic"—that is, for any purpose beyond washing, drinking, cooking, and sanitary purposes within the house. If, for instance, the person who kept the house used the water for the purpose of washing clothes which were delivered to people outside, then, it seems to me, there would be a genuine case of a supply for business purposes as distinct from domestic purposes. As to the decision in *Barnard Castle Urban District Council* v. *Wilson and Others* (1), I confess that I should myself have doubted whether the use of water for such a thing as a swimming bath was ever contemplated as being a use for "domestic purposes." It must be an exceptional sort of domestic life where a private swimming bath is attached to the house. That question, however, was not, as a matter of fact, argued in the *Barnard Castle Case* (1), and I do not understand the decision as being that a swimming bath would be a "domestic purpose." There the supply of water was to a charitable institution; it was a school, but still a charitable institution. I have reason to know that, even if it had not been a charitable institution, that fact would have made no difference to the learned judge's decision. I think, therefore, that his decision is a help to us in deciding this case. With these observations to explain what I intend by my own judgment, I concur in the judgment of my Lord.

CHANNELL J. I agree. I think that the words "a supply of water for any trade, manufacture, or business" mean some more direct use of the water in that business than the mere use of it for domestic purposes by the inmates of the house. The latter use is the thing which is covered by the water rate based upon the annual value of the house. It is a rough way of measuring the amount of water likely to be used for domestic

(1) 17 Times L. R. 754.

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purposes by the number of inmates which the house is capable of containing and accommodating. Probably one reason why water used for domestic purposes is to be paid for in that way is that domestic purposes include sanitary purposes, and it was on that ground not thought desirable that persons should have any inducement to stint the use of it. However that may be, I think that, although the supply for domestic purposes is paid for on the annual value, it does not make any difference whether the inmates of the house are guests who are entertained by the occupier at his own expense, or whether they pay for their board and lodging, or whether they are pupils whose parents pay for their board and lodging, or whether they are paupers for whom the parish pay. All those cases have been dealt with and decided; and it seems to me that our decision is, to a certain extent, governed by authority. As to restaurants and hotels, I thoroughly concur in what has been said. In the large majority of those cases there is beyond a doubt a use of the water for the purposes of the trade or business which could not come within the use covered by the ordinary rate based on annual value. I desire to offer no opinion upon the question whether there may not be some kind of hotels the supply of water to which would come within our decision in this case. As to the *Barnard Castle Case* (1), I would observe that Buckley J. was a judge trying both fact and law together, and that his decision with respect to the swimming bath being a "domestic purpose" was entirely upon a question of fact, and probably does not govern subsequent cases. For my own part, if the school was a school for the teaching of swimming, I should think that the supply of water was clearly a supply for the purposes of a trade or business, and would have to be paid for separately. I do not know whether or not it was a school for the teaching of swimming; but the important part of that case, and the part which seems to support our decision, is that the learned judge obviously intended to include the pupils of an ordinary school as inmates of a house whose use, for domestic purposes only, of water

(1) 17 Times L. R. 754.

would not require a special payment beyond the ordinary water rate.

For these reasons I am of opinion that our judgment should be for the appellant.

Judgment for the appellant.

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Solicitors for appellant: *Tarry, Sherlock & King, for E. E. Blyth, Norwich.*

Solicitors for respondents: *Williams & James, for Worship & Rising, Great Yarmouth.*

W. A.

THE KING *v.* THE MAYOR, ALDERMEN AND COUNCILLORS OF STEPNEY.

1901
Nov. 22.

Local Government—Metropolitan Borough—Compensation to Officer on Abolition of Office—Practice of Treasury—Discretion of Council—London Government Act, 1899 (62 & 63 *Vict. c.* 14), *s.* 30—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 81—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 120.

By s. 120 of the Local Government Act, 1888, which is incorporated by reference in the London Government Act, 1899, and which regulates the amount of compensation to be paid to an officer who suffers loss by the abolition of his office, it is provided that regard shall be had to the nature of his office, the duration of his service, &c., "and to all the other circumstances of the case, and the compensation shall not exceed the amount which under the Acts and Rules relating to Her Majesty's Civil Service is paid to a person on abolition of office," and the section goes on to give the person aggrieved an appeal to the Treasury.

The council of a metropolitan borough having resolved to abolish the office of vestry clerk to a local authority which had been transferred to them, considered that they were bound by an ascertained practice of the Treasury to make a deduction of one-fourth of the amount of compensation where the officer had not been required to devote his whole time to the duties of his office:—

Held, that a mandamus would lie to compel them to take the facts of the case into consideration, and to exercise a discretion in the matter.

RULE NISI for a mandamus.

Mr. Jutsum was appointed clerk to the vestry of Mile End Old Town in 1872, and continued to hold that office until February 8, 1901, when that office was abolished under the

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following circumstances. By the London Government Act, 1899, and an Order in Council made in pursuance thereof, an area including the parish of Mile End Old Town was included in the new metropolitan borough of Stepney and a borough council was established for that borough, and the existing officers of the parish were transferred to the council. By s. 30, sub-s. 1, of the Act a borough council is empowered to abolish the office of any officer transferred to the council by the Act whose office they may deem unnecessary; but any officer whose office is abolished is to be entitled to compensation. Sub-s. 2 of the same section provides that sub-s. 7 of s. 81 of the Local Government Act, 1894, shall apply to existing officers affected by the Act as if references in that sub-section to the district council were references to the borough council. Sub-s. 7 of s. 81 of the Local Government Act, 1894, provides that s. 120 of the Local Government Act, 1888 (1), shall apply to the case

(1) By 51 & 52 Vict. c. 41, the Local Government Act, 1888, s. 120, sub-s. 1, "Every existing officer declared by this Act to be entitled to compensation, and every other existing officer, whether before mentioned in this Act or not, who by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act, regard being had to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act or of anything done in pursuance of or in consequence of this Act, and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstances of the case, and the compensation shall not exceed the amount which, under the Acts and Rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office."

By sub-s. 2, "Every person who is entitled to compensation, as above mentioned, shall deliver to the county council a claim under his hand setting forth the whole amount received and expended by him or his predecessors in office, in every year during the period of five years next before the passing of this Act, on account of the emoluments for which he claims compensation. . . ."

By sub-s. 3, "Such statement shall be submitted to the county council, who shall forthwith take the same into consideration, and assess the just amount of compensation (if any), and shall forthwith inform the claimant of their decision."

of existing officers affected by the Act of 1894 as if references to the county council were references to the district council.

On January 9, 1901, the Stepney Borough Council passed a resolution abolishing the office of clerk to the vestry of Mile End Old Town as from February 8, 1901, and Mr. Jutsum, at the request of the council, sent in his claim for compensation accordingly, and subsequently attended before the council and gave them such information and explanation of his claim as they desired.

It appeared that during the period during which he had held office as clerk to the vestry he had been at liberty to engage, and had engaged, in private practice as a solicitor, and that his duties as clerk to the vestry had not occupied the whole of his time.

The town clerk of Stepney wrote to the Treasury asking what their rule was as to the amount of compensation paid to a person in the Civil Service on abolition of office under such circumstances; and he received a reply stating that, in the case of an officer who was not required to devote his whole time to his official duties, it was the practice of the Treasury in the administration of s. 120 of the Local Government Act, 1888, and s. 81 of the Local Government Act, 1894, to calculate his compensation allowance as if his whole time had been required, but to deduct one-fourth of the amount so arrived at.

The council thereupon, acting on this letter, assessed the compensation payable to Mr. Jutsum as if the whole of his time had been occupied by his official duties, and then deducted one-fourth of the amount.

By sub-s. 4, "If a claimant is aggrieved by the refusal of the county council to grant any compensation, or by the amount of compensation assessed, ... the claimant . . . . may . . . . appeal to the Treasury, who shall consider the case and determine whether any compensation, and if so, what amount ought to be granted to the claimant, and such determination shall be final."

By sub-s. 5, "Any claimant under this section, if so required, ... shall attend at a meeting of the council and answer upon oath . . . . all questions asked by any member of the council touching the matters set forth in his claim, and shall further produce all books, papers, and documents in his possession or under his control relating to such claim."

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Mr. Jutsum protested, and contended that the council, in acting upon this supposed rule of the Treasury, had not fulfilled the duty laid upon them by s. 120 of the Local Government Act, 1888, and obtained this rule nisi for a writ of mandamus to them to take the facts in regard to his claim into consideration.

Courthope-Munroe, shewed cause against the rule. The council was bound by s. 120 not to exceed the amount of compensation which would be paid by the Treasury to a civil servant under similar circumstances. They were right, therefore, in acting on what they found to be the practice of the Treasury in such cases. If the Treasury practice amounted to a rule, the council were bound to follow it; but, even if it did not, the person aggrieved has an appeal to the Treasury by sub-s. 4, and therefore in that case his remedy is not by mandamus, but by exercising this right of appeal: *Peebles* v. *Oswaldtwistle Urban District* (1); *Pasmore* v. *Oswaldtwistle Urban District*. (2) The Court will not grant a writ of mandamus where there is another equally effective remedy: *Reg.* v. *Registrar of Joint Stock Companies* (3); *In re Nathan*. (4)

Boydell Houghton, in support of the rule. The council were wrong. They have chosen to consider themselves bound by what was no rule, but only a practice of the Treasury, and they have not taken the matter into consideration, as they were bound to do under s. 120. They have, therefore, not exercised their discretion, but have declined jurisdiction, and a mandamus will lie: *Reg.* v. *Marsham*. (5)

The remedy of appeal given by sub-s. 4 is not an adequate remedy, since by the scheme of the Act the matter ought first to be taken into consideration by the local authority, who would be likely to know all the circumstances; and then, when they have exercised their discretion, if the claimant is aggrieved by their decision, he can appeal to the Treasury. But here they have not taken the circumstances into consideration or

(1) [1897] 1 Q. B. 625.
(2) [1898] A. C. 387.
(3) (1888) 21 Q. B. D. 131.
(4) (1884) 12 Q. B. D. 461.
(5) [1892] 1 Q. B. 371.

exercised their discretion at all, and the mandamus ought to go: *Reg.* v. *Vestry of St. Pancras.* (1)

The claimant is entitled to have his case heard both by the council and by the Treasury.

LORD ALVERSTONE C.J. It is now well established that if a body who are charged with the performance of a public duty do not discharge it, a mandamus will lie to compel them to discharge it; or if an inferior Court does not entertain a case which it ought to entertain, a mandamus will lie to compel it to entertain it. It is equally clear that if there is an effective alternative remedy, the Court has a discretion as to whether or not it will grant a writ of mandamus; and, as a rule, the Court does not grant the writ where there is a sufficient alternative remedy.

Personally, I thought for some time that under sub-s. 4 of s. 120 an appeal to the Treasury by a person aggrieved was a sufficient remedy; but, on consideration, we have come to the conclusion that it is better that the rule for a mandamus should be made absolute. The duty of the local authority is to have regard in fixing compensation to an officer "to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act, or of anything done in pursuance of or in consequence of this Act, and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstances of the case." I read these provisoes as indicating that it is intended that the local authority shall themselves exercise their discretion and assess the compensation having regard to all those matters. The important matters in this case would be the conditions on which his appointment was made, and the nature of his office or employment. Then there comes the additional condition, that the amount of compensation "shall not exceed the amount, which under the Acts and Rules relating to Her Majesty's Civil Service, is paid to a person on

(1) (1890) 24 Q. B. D. 371.

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abolition of office." If there were evidence before us to shew that there was a statute, or that there were statutory rules, or I will go further and say, if there were binding rules of the public service applicable to this case, then I think that we could not say that the local authority had not acted in accordance with the statute. But, on the materials before us, it is quite plain that whether there be such rules or not—as to which we know nothing—the local authority have not acted in accordance with any rule, but that they have inquired as to the practice which is applied by the Treasury in similar cases in regard to civil servants.

The practice which appears to be applied, and I have no doubt properly applied, in most cases is that there is a deduction of 25 per cent. from the total amount of compensation when the office abolished is not one which has taken the whole of the time of the holder of it; but I think it quite impossible to say that any such arbitrary deduction would, apart from any Act or rule of the Treasury, be a sufficient regard to all the circumstances of the case, or the condition on which his appointment was made, or the nature of his office or employment. Therefore, apart from a statutory rule, it would be the duty of the local authority to consider for themselves what the deduction should be. In some cases it seems to me it might be very much more than 25 per cent., and in some very much less. That being so, primâ facie it was the duty of the Stepney Council, unless controlled by some definite rule, to have regard to and consider the particular case.

Then it is said that the claimant is a person aggrieved, and that he can appeal to the Treasury under sub-s. 4. It seems to me that this remedy is really a remedy against an improper exercise of discretion by the lower tribunal as well as an improper refusal, and that the Treasury on appeal have the right of considering the case and determining whether the amount should be altered or not. It seems to me that under ordinary circumstances the local authority ought, in the first place, to exercise their discretion upon the circumstances of the man's particular case, and to assess the compensation with regard to them, and that it is not an adequate remedy to say

that the Treasury can fulfil the same function and discharge the same duty, even though they have not had the assistance of the exercise of the discretion of the local authority. I wish it to be distinctly understood that I am not suggesting that the Treasury will not be perfectly competent to review or deal with the matter if an appeal is brought to them under sub-s. 4; but I think that it was intended by the statute that the local authority should exercise its discretion upon the particular case for compensation, and that it was that discretion so exercised which should be the subject of the appeal, and that the person who was to appeal was to be a person who was to be aggrieved by the exercise of the discretion. If there were any evidence before me that the borough council had themselves thought that 25 per cent. was the right deduction or had exercised a discretion in the matter, I certainly should not have been a party to making the rule absolute; but in this case, as they have acted upon something which I do not think is binding upon them, and did not really exercise their discretion, I think that they ought to be ordered to consider the matter, having regard to the circumstances of the particular case.

DARLING J. I am of the same opinion. I think that very much the most forcible answer made to this application for a mandamus was that there was an equally adequate and convenient remedy provided by sub-s. 4 of s. 120 of the Act. If the borough council had really gone into the case and had exercised their own judgment upon it, and had refused the applicant any compensation, or had granted him an amount with which he was dissatisfied, and instead of going to the Treasury he had come and asked for this mandamus, I think that we ought to have refused it; but I do not think that the council really did consider the matter at all for themselves. They came to the conclusion that, because the section as to compensation said that they might grant compensation which "shall not exceed the amount which, under the Acts and Rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office," all they had to do was to write to the Treasury and find out what they were in the habit of giving, and then

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simply to say, "That is your compensation." As a matter of fact, it has not been proved that the borough council acted upon any rule of the Treasury at all, nor has it been proved that there was a rule. They acted upon what the Treasury told them was their practice. I do not think that they acted, therefore, upon any real judgment of their own. They borrowed a measure from the Treasury, and they tried to measure what they were to give as compensation with that, without applying their own judgment to what they were to give at all. Therefore, I think that they have not taken the first step here which would entitle Mr. Jutsum to appeal to the Treasury, and this mandamus simply calls upon them to take that first step. If they do take that first step, and arrive at precisely the same result for reasons which they do not give, it seems to me that we cannot interfere.

CHANNELL J. I agree, but I am not quite certain that I agree for the reasons that have been given. In the first place, I think that the mandamus ought to go because the local authority have not in fact exercised their discretion upon this matter. They have, by a mistake, thought that they were bound by a practice of the Treasury as though it were a rule, and consequently they exercised no discretion in the matter. In my opinion, if they had said, "We quite know that we are not bound by this absolutely, but we think it right to follow the Treasury practice," and had so followed it, they would have exercised their discretion and would have been right; but they thought that they were bound when they were not bound, and consequently it is a case for a mandamus calling upon them to exercise their discretion in the matter. It has been suggested that there is another adequate remedy. It is clearly settled that the Court does not grant a prerogative writ of mandamus when there is another remedy, if that other remedy is equally convenient and adequate. For some time I was inclined to think that there was another remedy equally convenient and applicable to this, and I now think that there is another remedy. I do not entertain the least doubt myself that Mr. Jutsum might, upon the present state of things, appeal to the

Treasury, and that he has another remedy. That is the point that I am not quite sure that we are all agreed upon. I think he has another remedy; but I do not think on the whole, after some consideration, that it is equally convenient, because I think that the local tribunal is the one that is best to investigate in the first instance the particular facts about this gentleman's employment. They will know much more about it than the Treasury can know, and it is much better that they should investigate the facts in the first instance. I think, therefore, that although the applicant here could, in the present state of things, go to the Treasury and get them to decide finally the amount of the allowance which he ought to have—and very likely he will have to go there in the end, and the Treasury will ultimately have to decide the matter—yet I do not think that that is an equally convenient remedy where the local authority have not exercised their discretion, because if he goes to the Treasury now he will have to go without the preliminary investigation, which might or might not be useful to him in going there.

I may add to that that I do not myself think that the present case is one coming within the rule, of which *Pasmore* v. *Oswaldtwistle Urban Council* (1) was an illustration, namely, that where an Act creates an obligation and enforces the performance in a specific manner, as a general rule the performance cannot be enforced in any other manner. I do not think that that rule applies where there are two different rights created by the statute, one a right to have compensation, and another a different right to have adjudication upon the subject of that compensation. It is the latter which is under consideration on this application for a mandamus.

Rule absolute.

Solicitors for appellant: *Jutsum & Jones.*
Solicitor for respondents: *Edward Betteley.*

(1) [1898] A. C. 387.

A. P. P. K.

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Dec. 16.

COUNCIL OF THE CITY OF WESTMINSTER *v.* LONDON COUNTY COUNCIL.

London Government—Transfer of Powers from County Council—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 84—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 5; *Sched. II., Part I.*

A structure made wholly of wood, except so far as nails are used in its construction, and erected for the temporary purpose of enabling persons to view a public procession or spectacle, is a wooden structure within the meaning of s. 84 of the London Building Act, 1894, and the power to license the setting up of such a structure, and to take proceedings for default in obtaining or observing the conditions of a licence, is transferred by the London Government Act, 1899, from the London County Council to each of the borough councils established by that Act as respects their borough.

CASE stated under s. 29 of the London Government Act, 1899.

By s. 1 of the London Government Act, 1899, it was enacted that the whole of the administrative county of London, exclusive of the City of London, should be divided into metropolitan boroughs, in the Act subsequently referred to as boroughs; and by that section it was also declared lawful for Her late Majesty by Order in Council, subject to and in accordance with the Act, to form each of the areas mentioned in the 1st schedule to the Act into a separate borough, subject to such alteration of area as might be required to give effect to the Act, and to such adjustments of boundaries as might appear to Her late Majesty in Council expedient for simplification or convenience of administration, and to establish and incorporate a council for each of the boroughs so formed.

By Sched. I. of the said Act, it was declared that one of the areas to be constituted a separate borough was "The area of the ancient parliamentary borough of Westminster, comprising the parishes of St. Margaret and St. John, Westminster, the parish of St. George, Hanover Square, the parish of St. James, Westminster, the parish of St. Martin-in-the-Fields, and the district of the Strand Board of Works, and including the

close of the collegiate church of St. Peter, Westminster, and the Liberty of the Rolls."

By the Borough of Westminster Order in Council, 1900, dated May 15, 1900, and made under and in pursuance of the provisions of the London Government Act, 1899, there was constituted a metropolitan borough of Westminster, and provisions were made therein for determining the area of the borough so constituted, and by the same Order in Council a council was established for the said borough.

By Royal Charter, dated October 29, 1900, there was granted and confirmed to the said metropolitan borough of Westminster the title of city, and it was declared that, from the date therein mentioned, the said borough should be called and styled the city of Westminster, and that the council established for the said borough should be styled the mayor, aldermen, and councillors of the city of Westminster.

By s. 5, sub-s. 1, of the London Government Act, 1899, it is enacted that: "As from the appointed day the powers and duties of the London county council under the enactments mentioned in Part I. of the second schedule to this Act shall, subject to the conditions mentioned in that schedule, be transferred to each borough council as respects their borough." November 9, 1900, was appointed as the day for the coming into force of this section by an order of the Lord President of the Privy Council dated October 18, 1900, and made under the powers of s. 33 of the London Government Act, 1899.

Sched. II., Part I., of the said Act, so far as directly material, runs as follows:—

"PART I.

"*Minor Powers and Duties to be transferred from County Council.*

Powers and Duties transferred.	Conditions of Transfer.
Power under section 84 of the London Building Act, 1894, to license the setting up of wooden structures, and power to take proceedings for default in obtaining or observing the conditions of a licence under that section."	

Sect. 84 of the London Building Act, 1894, is one of a

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group of sections included in Part VII. of that Act under the title, "Special and temporary buildings and wooden structures." These sections are in the following terms :—

Sect. 82 : "(1.) Where a builder is desirous of erecting an iron building or structure, or any other building or structure, to which the general provisions of Part VI. of this Act are inapplicable, or in the opinion of the council inappropriate, having regard to the special purpose for which the building or structure is designed and actually used, he shall make an application to the council accompanied by a plan of the proposed building with such particulars as to the construction thereof as may be required by the council.

"(2.) The council, if satisfied with such plan and particulars, shall signify their approval of the same in writing, and thereupon the building may be constructed according to such plan and particulars; but the council shall not authorize any building of the warehouse class to be erected of greater cubical extent than 250,000 cubic feet, except in accordance with the foregoing provisions of this Act.

"(3.) The council may, for the purpose of regulating the procedure in relation to such applications, issue such general rules as they think fit as to the time and manner of making applications, and as to the plans to be presented, the expenses to be incurred, and any other matter or thing connected therewith.

"(4.) All expenses incurred in and about the obtaining the approval of the council shall be paid by the builder to the superintending architect or to such other person as the council may appoint, and in default of payment may be recovered in a summary manner.

"(5.) A copy of any plans and particulars approved by the council shall be furnished to the district surveyor within whose district the building to which such plans and particulars relate is situate, and it shall be his duty to ascertain that the same is built in accordance with the said plans and particulars."

Sect. 83 : "Where an application is made to the council by any person stating his desire to erect in any place an iron or other building or structure of a temporary character to which the

general provisions of Part VI. of this Act are inapplicable, the council may, if they approve of the plan and particulars of the building or structure, limit the period during which it shall be allowed to remain in that place, and may make their approval subject to such conditions as to the removal of the building or structure or otherwise as they think fit, and if at the expiration of that period the building or structure be not removed in accordance with those conditions, the council may serve a notice on the occupier or owner of such building or structure requiring him to remove it within a reasonable time specified in the notice; and if the occupier or owner fail to remove such building or structure within the time named, the council may, notwithstanding the imposition and recovery of any penalty, cause complaint thereof to be made before a petty sessional Court, who shall thereupon issue a summons requiring such occupier or owner to appear to answer such complaint; and if the said complaint is proved to the satisfaction of the Court, the Court may make an order in writing authorizing the council to enter upon the land upon which such building is situated and to remove or take down the same, and do whatever may be necessary for such purpose, and also to remove the materials of which the same is composed to a convenient place, and (unless the expenses of the council be paid to them within fourteen days after such removal) sell the same as they think proper."

Sect. 84: "(1.) No person shall set up in any place any wooden structure (unless it be exempt from the operation of this part of this Act), except hoardings inclosing vacant land and not exceeding in any part twelve feet in height, without having first obtained for that purpose a licence from the council; and the licence may contain such conditions with respect to the structure and the time for which it is to be permitted to continue in the said place as the council think expedient.

"(2.) Provided that such a licence shall not be required in the case of any wooden structure of a movable or temporary character erected by a builder for his use during the construction, alteration, or repair of any building unless the same is

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not taken down or removed immediately after such construction, alteration, or repair.

"Provided that this section shall not extend to or apply within the City" (i.e., the City of London) "or to any hoarding duly licensed by the local authority under any statutory powers in that behalf."

By s. 200 of the said Act, "(3.) Every person who . . . . (*e*) sets up, erects, or adapts any building or structure to which Part VII. of this Act applies without having obtained any licence required by that part of this Act, or makes default in observing any of the conditions contained in such licence, shall be liable to a penalty not exceeding twenty pounds a day during every day of the continuance of the non-compliance with the order of the Court in reference to the matters aforesaid."

By Sched. III., "Fees payable to District Surveyors.

"Part I. . . . On wooden and temporary structures. On inspection of any wooden structure, or on inspection of any structure or erection put up on any public occasion the same amount as for a new building calculated on the area of the structure or erection without reference to the area of any building to which it may be attached, or in or on which it may be put up."

In order to enable spectators to view the funeral procession of Her late Majesty, Queen Victoria, on February 2, 1901, and the procession of His present Majesty to open Parliament in State on February 14, 1901, a number of stands or structures were erected within the city of Westminster along the line of route of the procession. These stands or structures were constructed of wood except the nails and some of the other fastenings, and the cloth or other hangings placed upon them. They were of a temporary character, and have all now been removed.

Applications for approval of plans and particulars of such stands or structures were made to and granted by the London county council in the case of certain of the stands so erected; in the case of certain others of the said stands, applications for permission or licence to erect them were made to and granted

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by the council of the city of Westminster; and in the case of certain others no application for approval, licence, or permission was made either to the council of the city of Westminster or to the London county council.

Questions have arisen between the London county council and the council of the city of Westminster as to which of the said councils was the proper authority under the London Building Act, 1894, (1.) to control, approve, or license the said structures referred to in the schedules to this case; (2.) to take proceedings against the persons who have without licence, permission, or approval erected certain of the structures as above mentioned; and, further, as to whether such structures were or were not subject to the supervision or inspection of the district surveyor under the Act.

The council of the city of Westminster contend that the structures in question are wooden structures within s. 84 of the London Building Act, 1894, and do not fall within the provisions of ss. 82 and 83 of that Act; and that by the effect of s. 5, sub-s. 1, of the London Government Act, 1899, all powers and duties of the county council and its officers and the district surveyor with respect to such structures in the city of Westminster were transferred to the council of the said city on November 9, 1900, and that the county council has now no authority either to license such structures within the said city, or to take proceedings for default in obtaining or observing the conditions of any licence granted with respect to such structures, and that the supervision and inspection of such structures by the district surveyor has been transferred by the London Government Act, 1899, to the council of the said city and its officers.

The London county council contend that the structures in question are structures of a temporary character falling within the operation of ss. 82 and 83 of the London Building Act, 1894, and that, notwithstanding the provisions of s. 5 of the London Government Act, 1899, they still have authority to approve the plans and particulars of such structures, and to take proceedings in respect of structures if erected or maintained without or contrary to the terms of their approval, and

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that such structures remain subject to the inspection and supervision of the district surveyor.

Manisty, *K.C.*, and *Craies*, for the council of the city of Westminster. The structures referred to in the case are wooden structures within s. 84 of the London Building Act, 1894, and the power of the county council with respect to them is now transferred to the Westminster council. Sects. 82, 83, and 84 of the Act of 1894 are not there enacted for the first time. The first is copied from s. 56 of the Metropolitan Building Act, 1855, the second from s. 12 of the Metropolis Management Act, 1882, and the third from s. 13 of the same Act with this alteration: that whereas s. 13 applied only to "movable or temporary wooden structures," in s. 84 the words "movable or temporary" are omitted. If s. 13 were in force now, it is clear that these structures would have been within that section, and the extension of its operation to wooden structures which are not temporary does not make it apply the less to those that are. If structures of this kind do not come within s. 84, it is difficult to see what it could apply to. It is contended by the county council that they are "structures of a temporary character" within s. 83 of the Act of 1894, and that the control of them is consequently not transferred. But ss. 82 and 83 were intended to apply to structures which are or might be supposed to fall within Part VI., but to which the general provisions of that part were inapplicable.

Avory, *K.C.*, and *Daldy*, for the London county council. Many of the structures put up to view processions are made of iron with wooden seatings. If the Westminster council are right there would be a conflict of jurisdiction, and a builder would have to go for his licence to one body or the other according as his structure was made wholly of wood or partly of wood and partly of iron. These structures fall within s. 83. Sect. 84 applies only to structures intended to be more or less permanent, such as a wooden shed attached to a brick building. The case of *Venner* v. *M'Donell* (1) seems to be an authority that temporary wooden structures of this description fall within

(1) [1897] 1 Q. B. 421.

s. 83, and not within s. 84. The object of these provisions is to prevent danger. But the whole of the sections relating to dangerous structures contained in Part IX. of the Act of 1894 are still in force. Consequently, if the licence has to be granted under s. 84 by the borough council, the county council will still have to decide whether the structure is dangerous; and if they decide that it is, the effect will be to destroy the licence already granted. Again, in any case fees would still have to be paid to the district surveyor appointed by the county council for inspection of these structures and reporting upon them, the duty to do which still remains in the district surveyor.

Manisty, K.C., in reply.

LORD ALVERSTONE C.J. The question raised in this is whether the council of the city of Westminster or the London county council is the proper authority to license the construction and lay down the conditions of construction of a certain class of wooden structures which it is proposed or may be proposed to erect for the purpose of viewing public processions in the streets within the area of the borough of Westminster. The class of structures with respect to which the question is raised are structures made wholly of wood, except so far as nails are used in the construction, and we confine our answer to structures of that description, as we wish to avoid laying down any general rule which would cover cases of a somewhat different description. In my opinion, the question should be answered in favour of the Westminster council. The history of the legislation appears to be this. By s. 56 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), it was provided that a builder who was desirous of erecting a building to which the rules of that Act were inapplicable should apply to the Metropolitan Board of Works for their consent. By s. 12 of the Metropolis Management Act, 1882 (45 & 46 Vict. c. 14), the Board of Works were empowered to impose conditions requiring the removal within a certain period of buildings of a temporary character to which the rules of the Metropolitan Building Act of 1855 did not apply. And by s. 13 of the Act of 1882 wooden

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structures of a movable or temporary character were not to be erected without the licence of the Board. When the London Building Act, 1894, was passed, s. 56 of the Act of 1855 was replaced by s. 82; s. 12 of the Act of 1882 by s. 83; and s. 13 of the last-mentioned Act was replaced by s. 84 with this modification: that whereas s. 13 applied only to movable or temporary wooden structures, s. 84 in terms applies to wooden structures generally with the exception of hoardings. The question, then, which we have to consider is what is the class of structures that fall within ss. 82 and 83 as distinguished from s. 84. As far as I can see, ss. 82 and 83 were intended to apply to structures which would ordinarily have been supposed to come under Part VI. of the Act, but as to which, either from their construction or their intended use, it was thought by the county council that the general provisions of Part VI. were inapplicable. Sect. 84, as it now stands, seems to be a section giving control over wooden structures to which no general provisions or substituted provisions of a general character would be applicable. It was, indeed, contended that s. 84 only applied to permanent wooden structures. But I am satisfied that that is not so, not merely because the proviso excepts temporary wooden structures of a certain class, but also because the enacting part gives a right to impose a condition as to the length of time the structure shall remain up. Then we come to the London Government Act, 1899, which transfers the powers of s. 84 as to licensing the erection of wooden structures, and as to taking proceedings for default in obtaining or observing the conditions of the licence to the borough councils. I asked Mr. Avory what he suggested would be transferred if his argument was right. The only case he was able to suggest was a wooden structure added on to some building, and intended to be of a more or less permanent character. That suggestion does not seem to me to be satisfactory. I think that the London Government Act recognised that matters which ought to be dealt with by a central body, and could be the subject of substituted regulations in place of the general provisions of Part VI., should be dealt with by the county

council, but that local matters such as the erection of wooden structures for a limited time, to which no general or substituted regulation could be intended to apply, should be transferred to the borough councils.

There remains the question of the duty of supervision by the district surveyors. I do not think we ought to decide the question, and for two reasons. In the first place, the decision may to a certain extent depend on the very conditions which the Westminster council may think fit to annex to the licence. Secondly, we could not deal with that question without deciding what are the rights, duties, and obligations of district surveyors under the Act. They are not represented before us, and their case has not been argued. We therefore propose not to answer the third question which has been put to us.

Lord Alverstone C.J.

DARLING J. I am of the same opinion.

CHANNELL J. I agree.

Judgment for the Westminster Council.

Solicitors for the Westminster Council: *Caprons, Hitchins & Co.*

Solicitors for the London County Council: *Blaxland.*

J. F. C.

C. A.
1902
Jan. 15.

[IN THE COURT OF APPEAL.]

VESTRY OF ST. JAMES AND ST. JOHN, CLERKENWELL *v.* EDMONDSON & SON.

Metropolis—Management Acts — Highway within Two Jurisdictions —New Street—Sewer—Recovery of Expenses—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 *&* 26 *Vict. c.* 102), *ss.* 52, 112.

The boundary between two parishes, one of which was in the county of London and the other in Middlesex, ran along the middle of an old highway 2993 feet in length. At the time when the Metropolis Management Act, 1855, came into operation, buildings had been erected on the Middlesex side of the highway, along nearly the whole of its length, but on the London side there were only seven or eight buildings situated at various points. A number of buildings having recently been erected along the London side of the highway, the vestry of the parish to which that portion of the highway belonged laid down a sewer under it for the purpose of draining those buildings, and apportioned the expenses of making the sewer among the frontagers upon that side of the highway on the ground that it was a new street. One of the frontagers having refused to pay the amount apportioned upon him, application was made to justices by the vestry for an order for payment by him of that amount. The justices found as a fact that, at the time when the Metropolis Management Act, 1855, came into operation, the highway, as a whole, had already become a street; and, that being so, they decided that they could not deal with the London side of the highway by itself for the purpose of determining whether it was a new street, and therefore they dismissed the application:—

Held, affirming the judgment of a Divisional Court, that, upon the finding of the justices as above mentioned, their decision was right.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J. and Kennedy J.) upon a case stated by justices of the county of London.

The facts of the case are fully set out in the report of the decision in the Court below (1), but may for the purposes of this report be more briefly stated as follows:—

A complaint had been preferred by the appellants, the vestry of Clerkenwell, against the respondents under the Metropolis Management Act, 1862, in respect of the non-payment by the

(1) [1901] 1 K. B. 264.

respondents of an amount apportioned as payable by them, as owners of premises in a new street called Colney Hatch Lane, as their proportion of the expenses of laying a new sewer therein.

Colney Hatch Lane was an old highway, 2993 feet long, which formed the boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey, in the county of Middlesex. The actual boundary line ran nearly along the middle of the lane, but the greater part of the surface was within the parish of Clerkenwell. Before the year 1856, when the first of the Metropolis Management Acts (18 & 19 Vict. c. 120) came into operation, buildings had been erected on the Hornsey side of the lane, along nearly the whole of its length, but on the Clerkenwell side there were at that time only seven or eight buildings situated at various points. Since the year 1856, and more particularly within the last few years, the remainder of the Clerkenwell side had been laid out for building, and the greater part of the frontage to the lane on that side was now covered with buildings. The appellants had laid a sewer for the drainage of the premises on the Clerkenwell side of the lane, which was completed in the year 1898. The total cost of the sewer and works appertaining thereto was 1106*l.* 14*s.* 5*d.*, of which the appellants charged to sewer rates 103*l.* 7*s.* 3*d.*, and apportioned the balance among the owners of the premises on the Clerkenwell side of the lane according to the frontage of their respective premises. The amounts apportioned in respect of the respondents' premises were 130*l.* 6*s.* 8*d.* and 7*l.* 2*s.* 10*d.* respectively. These sums were duly demanded, and, the respondents having refused to pay them, a complaint was preferred as above mentioned under the Metropolis Management Act, 1862, ss. 52, 53.

The justices found on the hearing of the complaint that Colney Hatch Lane, taken as a whole, was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation, and were of opinion that that portion of the lane which was in Clerkenwell could not be dealt with by itself for the purpose of determining whether it

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was a new street, and for those reasons they dismissed the summons.

The question for the opinion of the Court stated in the case was whether the portion of Colney Hatch Lane which was in Clerkenwell could be dealt with by itself without regard to the portion which was in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it was a new street.

The Divisional Court answered that question in the negative, and therefore gave judgment for the respondents.

Macmorran, K.C. (*C. F. Pritchard*, with him), for the appellants. The justices proceeded on the assumption that the whole lane must necessarily be treated for the purposes of this case as indivisible and as one street. It was, no doubt, one highway and one street in a popular sense, that is to say, for the purposes of people using it; but it is submitted that there is nothing in that to prevent the part of the lane situated within the jurisdiction of the appellants from becoming, through a change of circumstances, by itself a new street, technically, for the purposes of the Metropolis Management Acts. For this purpose a new street may be constituted by the building of houses along a part of an old highway so as to give it a new character. The definition of "new street" given by s. 112 of the Metropolis Management Act, 1862, includes part of a street; and a part of an existing street, which acquires a new character through having new houses built fronting to it, is a new street for the purposes of the Act: *Richards* v. *Kessick*. (1) This lane cannot for the purposes of the Metropolis Management Acts be looked at as an indivisible whole, because part of it was outside, and part within, the metropolitan area. It is submitted that, unless in a case like this the portion of the lane which is within the metropolis can be looked at by itself, great difficulties must arise as to the application of the Metropolis Management Acts.

[MATHEW L.J. It is difficult to see how for this purpose highways on the boundaries of two jurisdictions can be treated differently from other highways.]

(1) (1888) 57 L. J. (M.C.) 48.

[He also cited *White* v. *Fulham Vestry* (1); *Property Exchange* (*No.* 1) *Limited* v. *Wandsworth Board of Works*. (2)]

Alexander Glen, for the respondents, was not called on to argue.

COLLINS M.R. I think that this appeal must be dismissed. The question in this case arises in respect of a certain old highway, which forms the boundary between the parish of Hornsey in the county of Middlesex and the parish of Clerkenwell in the county of London, the actual boundary running somewhere along the middle of the roadway, rather nearer the Hornsey side of it, as I understand, than the Clerkenwell side. The appellants, who were an authority acting under the provisions of the Metropolis Management Acts, were desirous of treating the part of that highway which is in the parish of Clerkenwell as a new street. If it were such a street, that would enable the appellants to demand from the frontagers the expenses of laying down a new sewer, which otherwise would have to be borne out of the rates. It was therefore contended by the appellants that that part of the highway ought to be regarded by itself as a new street. The matter came before the justices, who found upon the facts that, before the Metropolis Management Act, 1855, came into operation, this highway had become a street by reason of houses having been built upon the Hornsey side of it; and that therefore it was not a new street, but an old street at the time when the Act took effect. The question whether that was so or not was, I think, one of fact. It has been laid down by many authorities that the question whether a particular highway has become a "street" is one, not of law, but of fact, which is to be determined by the application of common sense, and in accordance with the understanding of ordinary persons. It is therefore essentially a question for the tribunal which has in relation to such matters to determine questions of fact. No such difficulty arises in this case as has arisen in some cases, to which we have been referred, by reason of an addition to the area of an old highway. A considerable time ago houses were

(1) (1896) 74 L. T. 425. (2) (1901) 84 L. T. 689.

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built on the Hornsey side of the old highway in such number and in such a way as, according to the finding of the tribunal which in this case was the judge of questions of fact, to make the old highway a street before the Metropolis Management Act, 1855, took effect, and therefore before there was any question of making this sewer. The argument for the appellants seems to me to involve a confusion between the question, what constitutes physically the street, and the question, what are the respective rights and liabilities of persons who own premises on each side of it, because it is a street. It appears to be argued for the appellants that, because the rights and liabilities of the owners of premises on one side of this street, which are regulated by the Metropolis Management Acts, are different from those of the owners of premises on the other side of the street, which are regulated by the Public Health Act, 1875, therefore we ought to hold that one part of the physical entity, which as a whole was already a street, has, by reason of buildings being newly erected along it, become by itself a new street within the meaning of the Metropolis Management Acts. This appears to me to be introducing into the question, what constitutes a street, the question, what are the legal rights and liabilities of the persons who own premises abutting on the street, matters which seem to me to have nothing to do with one another. The justices in this case found that the whole highway, as a physical entity, in whatever jurisdiction its different parts might be, had become a street before the Metropolis Management Act, 1855, came into operation. As I have said, I think that was a question of fact for them, and in my opinion their finding upon it concludes this case. For these reasons I think that the judgment of the Divisional Court was right.

ROMER L.J. I agree. I think that there is great force in the observation of Kennedy J. in the Court below, where he said that in his opinion, "to create one more artificiality in the understanding of the expression 'street' and 'new street' is certainly not to be desired." It appears to me that the lane in question in this case was, and is, one street, and an old one,

and ought not for the purposes of the appellants to be treated as two streets.

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MATHEW L.J. I am of the same opinion. The argument for the appellants invites us to the conclusion that part of a highway, which was already an old street when the Metropolis Management Act, 1855, came into force, may be a new street for the purposes of the Metropolis Management Act, 1862. I cannot, however, find in those Acts any indication of an intention on the part of the Legislature that such a result should be possible. In the present case we are dealing with a highway which, having regard to the finding of the justices, must be taken to have been an old street in 1856. It is argued, nevertheless, that a portion of that old street can by itself subsequently become a new street through having houses built along it. But, according to the finding of the justices, the character of being old was in fact impressed upon the whole, and therefore upon each part, of the street, before the Metropolis Management Act, 1855, was passed. The cases which were relied upon by the counsel for the appellants, for the purpose of shewing that part of a street may be a new street, were all cases in which an addition had been made to the area of the old street.

Appeal dismissed.

Solicitors for appellants : *Boulton, Sons & Sandeman.*
Solicitors for respondents : *Tatham & Hardy.*

E. L.

C. A.
1902
Jan. 13.

[IN THE COURT OF APPEAL.]

DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* ACTIEN-GESELLSCHAFT FÜR MOTOR UND MOTORFAHRZEUGBAU VORM. CUDELL & CO.

Practice—Foreign Corporation—Service of Writ within the Jurisdiction—Foreign Company carrying on Business temporarily in England—Order IX., *r.* 8—*Order* LXX., *r.* 3.

The defendants, a foreign corporation, who were manufacturers of motor-cars abroad, hired a "stand" at the Crystal Palace for the exhibition of articles of their manufacture at a cycle show, and exhibited at the show, which lasted for nine days, among other articles, a motor-car fitted with tyres, which were alleged by the plaintiffs to be an infringement of their patent. The defendants' "stand" was in charge of a person employed by them as their representative, whose duty it was to explain the working of the articles exhibited, and to take orders for and press the sale of the defendants' goods:—

Held, that, during the continuance of the show, the defendants were carrying on business so as to be resident at a place within the jurisdiction, and therefore could be served there with a writ in an action by the plaintiffs for infringement of their patent under Order IX., r. 8.

APPEAL from an order of Channell J. at chambers refusing to set aside the writ and service of the writ.

The action was by the owners of a patent for a pneumatic tyre against a foreign company, for an injunction to restrain the defendants from infringing the plaintiffs' patent and for damages for infringement of the same.

The defendants were incorporated according to the law of Germany, and carried on business in that country as manufacturers of motor-cars. Save as after mentioned they had no place of business in England. They had hired a "stand" at the Crystal Palace for the exhibition of articles of their manufacture at the National Cycle Show held there from November 22 to November 30, 1901. The defendants had during the show the exclusive use of the "stand," upon which their name was affixed, and had exhibited there, among other articles, a motor-car fitted with tyres, which were alleged by

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the plaintiffs to be an infringement of their patent. The "stand" was in the charge of a man named Struck, who was in the defendants' employ, and whose duty it was to explain the working of the articles exhibited, and to take orders for and press the sale of the defendants' goods. Struck was neither a director nor the secretary of the defendant company. He had an assistant under him named Müller, whose duty it was to take charge of the stand, and answer inquiries during the temporary absence of Struck. The writ in the action had, in the absence of Struck, been served on Müller at the defendants' "stand" on November 27, 1901. The defendants, who had entered a provisional appearance, applied to the learned judge at chambers to set aside the writ and service, the ground stated in the summons being that the defendants were a foreign corporation resident out of the jurisdiction. The learned judge held that the defendants were carrying on business at a place within the jurisdiction at the time of service of the writ, and therefore could be served under Order IX., r. 8. The defendants asked for leave to amend the summons so as to raise the further point that the service, being upon Müller, and not upon Struck, the head representative of the defendants, was not made on the right person under Order IX., r. 8, and was therefore irregular. (1) The learned judge refused leave to amend the summons on the ground that, if the defendants had raised this objection distinctly at first, the defect might have been cured by serving Struck, which was no longer possible. He therefore dismissed the defendants' application.

Danckwerts, *K.C.*, and *R. B. D. Acland*, for the defendants. In the first place, the defendants ought to have leave to amend their summons in order to raise the point that the service of the writ on Müller was irregular. The defendants are prepared to contend that even Struck was not a head officer of the defendants within the meaning of Order IX., r. 8, but clearly Müller was not such an officer. Secondly, the result of the

(1) Order LXX., r. 3, provides that "where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion."

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cases is that, in order to render a foreign corporation liable to be served with a writ within the jurisdiction, they must be carrying on business within the jurisdiction at some fixed place, which can be considered their place of business, in such a manner that they can be deemed to be resident there. It is not contended that for this purpose there must necessarily be an intention to carry on business within the jurisdiction permanently or for an indefinite time. It may possibly be that under some circumstances, though there was only an intention to carry on business at some place within the jurisdiction for a limited period, a foreign corporation might be deemed to have been resident within the jurisdiction during that period. But in each case all the circumstances under which the alleged business was carried on must be looked at, and it is an essential element that it should be carried on for a period which makes some approach to permanency. The idea of residence involves a certain degree of permanency. It cannot be said in this case that the defendants carried on business in this country so that they can be deemed to have been for any period resident here. Their business is the manufacture of motor-cars, which they carry on abroad; and they cannot be considered as having resided in this country so as to render them liable to be served here with a writ merely because, by way of advertisement, they sent over some motor-cars to be exhibited at a show for a period of nine days in charge of a servant of theirs, who had authority to take orders.

A "stand" at a show, such as the National Cycle Show, cannot be regarded as a place of business occupied by the defendants. It is merely a space marked out which they are licensed to use for the purpose of exhibiting their goods, but the Crystal Palace Company are the occupiers of the whole building, and the various exhibitors are subject to the regulations and conditions as to hours of opening and closing and other matters under which the show is carried on. Suppose a foreign company sent a traveller to this country, who occupied a room at an hotel for nine days, and there displayed samples of, and took orders for, the company's goods. It could not in such a case be said that the company resided for nine days

within the jurisdiction, but substantially there is no difference between that case and the present.

[They cited *Newby* v. *Van Oppen* (1); *La Bourgogne* (2); *Haggin* v. *Comptoir d'Escompte de Paris* (3); *The Princess Clementine* (4); *Badcock* v. *Cumberland Gap Park Co.* (5); *Mackereth* v. *Glasgow and South Western Banking Co.* (6)]

R. M. Bray, K.C., and *A. J. Walter*, for the plaintiffs, were not called upon.

COLLINS M.R. I am of opinion that this appeal must be dismissed. The question is whether, under the circumstances of this case, the defendants, who are a foreign company, can be made amenable to the jurisdiction of the High Court in this country. Two points have been raised in this Court, one being that the defendants, as a foreign corporation resident out of the jurisdiction, could not be served within the jurisdiction at all under Order IX., r. 8, and the other being that, assuming that they could be served, the service in this case was not made upon the right person under the rule. The only objection to the service formulated in the summons taken out by the defendants was that the defendants were a foreign corporation not resident within the jurisdiction, no point being made with regard to the service of the writ not having been upon the proper officer of the defendants. The learned judge refused to set aside the service of the writ on the ground mentioned in the summons, because the defendants were at the time of the service carrying on business in this country; and he refused to amend the summons so as to raise the point that Struck, and not Müller, was the person who should have been served.

The facts are as follows. The defendants appear to have hired premises at the Crystal Palace for the purpose of exhibiting their wares during the National Cycle Show; and they sent over a man in their employ, named Struck, whose duty it was on their behalf to look after the articles exhibited, and to push sales of the defendants' goods. They also sent over a

(1) (1872) L. R. 7 Q. B. 293.
(2) [1899] P. 1; [1899] A. C. 431.
(3) (1889) 23 Q. B. D. 519.
(4) [1897] P. 18.
(5) [1893] 1 Ch. 362.
(6) (1873) L. R. 8 Ex. 149.

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man named Müller to act as Struck's subordinate for the before-mentioned purposes, and the writ in the action was served upon Müller. The learned judge, as I have said, refused to allow the defendants to amend their summons. The defendants admit that they cannot raise the point that the service was upon the wrong person without an amendment of the summons, and they accordingly ask us now to allow an amendment, so as to enable them to raise this point. It is a matter of discretion whether such an amendment should be allowed for the purpose of enabling the defendants to take a technical point of this kind, and I think that under the circumstances of this case it would be wrong for us to interfere with the exercise by the learned judge of his discretion in this respect.

The only question, therefore, which remains to be dealt with, is whether there was any power to serve the defendants with the writ under Order IX., r. 8. That rule, so far as material, provides that "in the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation." It appears to me that, having regard to the decisions on this rule, Struck must be considered as a head officer of the defendants within its meaning. He was a person sent over by the defendant corporation as their representative to do for them in this country business of theirs, which, not being a concrete entity, they could not do for themselves like an ordinary individual, namely, the business of exhibiting and vending their wares at the show at the Crystal Palace. It seems to me that service of the writ could properly have been made upon him, as their head officer, assuming that the defendants could be served with the writ at all. In order to see whether they were liable to be so served, it is necessary to consider whether, upon the facts, they can be said to have been resident in England when the service was effected. It has been held in a number of cases, beginning with *Newby* v. *Van Oppen* (1) and ending with the case of

(1) L. R. 7 Q. B. 293.

La Bourgogne (1), that the true test in such cases is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction, that being the only way in which a corporation can reside in this country. It can only so reside through its agent, not being a concrete entity itself; but, if it so resides by its agent, it must be considered for this purpose as itself residing within the jurisdiction. In several of the cases decided on this subject the difficulty has been to determine whether the business carried on by an agent at a certain place within the jurisdiction was the business of the company itself carried on by that agent as representing them, or was really the business of the agent. With regard to that point very nice questions of fact have in some cases arisen. But in the present case we are relieved from any such difficulty. The defendants did not resort, for the purposes of their business, to some person who was himself carrying on an independent business of his own at some place in this country; and therefore we are not called on in this case to consider the question whether a foreign corporation, making use, for their purposes, of a person carrying on a business of his own, can under the circumstances be regarded as themselves carrying on their own business within the jurisdiction. A difficult question of that kind arose in the case of *La Bourgogne*. (1) There a foreign company employed as their agent in this country a person who also acted as agent for two other companies, and transacted their business on the same premises; and we held that the defendants were through him carrying on business in such a way as to be resident within the jurisdiction. No such difficulty arises here as arose in that case. Here the defendants hired premises for their own exclusive use, and did not resort for their purposes to some person who was carrying on an independent business, but employed their own servant to conduct the business. The only difficulty in this case arises from the fact that the time during which the defendants can be said to have carried on business in this country is limited to that of the duration of the show at the Crystal Palace, namely, nine days. It was argued by the counsel for the defendants

(1) [1899] P. 1; [1899] A. C. 431.

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that, in determining the question of residence or no residence, length of time is an essential element. I agree that it is an element to be considered; but it was, as I understood, admitted that, if a foreign corporation were to announce their intention of carrying on their own business, and were to carry it on, at a certain place in this country for a limited period, the mere fact that they so carried it on only for a limited period would not prevent the company from being considered as resident within the jurisdiction for that period. The period of nine days is not necessarily a negligible quantity; it may in many cases be a very substantial period. In the case of an exhibition, such as the show in the present case, which is largely resorted to by manufacturers for the purpose of exhibiting a particular class of goods, and by customers desirous of purchasing such goods, as much business in the kind of goods exhibited might probably be done in nine days as in as many months in an ordinary town. I do not think that, where a foreign company carries on business in this country so as in all other respects to fulfil the conditions necessary to constitute residence within the jurisdiction, they can be said not to have so resided, merely because that residence was confined to a period such as nine days. In the present case I think we have in other respects all the elements necessary to constitute for this purpose residence by the defendants. It appears to be suggested that the defendants cannot be said to have carried on business in this country, because they did not carry on the whole of their business here. It was said that their business was that of manufacturers of motor-cars, and that manufacture was carried on abroad, and not at the Crystal Palace. It seems to me that it is only necessary to state that point in plain terms in order to confute it. It is clearly not necessary that a company should carry on the whole of its business in this country. A substantial part of the defendants' business was the selling of their manufactures, and that was during the show carried on here. Customers had during that period an opportunity of inspecting the defendants' wares, and prices were quoted, and orders accepted for them by the defendants. Nothing more could have been done with regard to the sale of the defendants'

wares at their place of business abroad. For these reasons I think the appeal must be dismissed.

ROMER L.J. I agree. The result of the authorities appears to me to be that, if for a substantial period of time business is carried on by a foreign corporation at a fixed place of business in this country, through some person, who there carries on the corporation's business as their representative and not merely his own independent business, then for that period the company must be considered as resident within the jurisdiction for the purpose of service of a writ. The facts of the present case appear to me to bring the defendants within that proposition. On that short ground I am of opinion that the appeal fails. With regard to the subsidiary point, I am also of opinion that leave to amend ought not to be given.

MATHEW L.J. I agree. With regard to the technical point, that the service should have been on Struck and not Müller, I see no ground for overruling the exercise by the learned judge of his discretion as to an amendment of the summons. As to the other point, is there any doubt that, if the defendants were an English company, they could properly be said to have carried on business during the show at the "stand" hired by them for their exclusive use for the purposes of their business? I think that, on the facts of this case, all the conditions were fulfilled by the defendants, which, according to the decisions, are necessary in order to constitute residence within the jurisdiction by a foreign corporation. A corporation can, of course, only be said to reside anywhere in a figurative sense, and it has been held for the present purpose to reside in a place where it carries on its business.

Appeal dismissed.

Solicitors for plaintiffs: *J. B. & F. Purchase.*
Solicitors for defendants: *Cruesemann & Rouse.*

E. L.

1901
Nov. 15.

HANDLEY *v.* LONDON, EDINBURGH AND GLASGOW ASSURANCE COMPANY.

County Court—Practice—Misdirection—Refusal of New Trial—Appeal to High Court.

Although a party who appeals directly to the High Court against the judgment of a county court judge on the ground of misdirection is not entitled to be heard unless he took the objection to the judge's direction at the time of the trial, it is otherwise if he first applies to the county court judge for a new trial on the ground of misdirection, and then upon being refused appeals to the High Court against such refusal. It is enough that the objection to the direction is taken for the first time upon the application for a new trial to the county court judge.

APPEAL by the defendants from the refusal of the Commissioner of the City of London Court to grant a new trial in an action tried before him and a jury.

The plaintiff had been an agent of the defendant company until May 28, 1900, when he was suspended, and that suspension was followed by dismissal on June 7. The plaintiff then brought his action against the defendants claiming various sums. He gave credit for certain sums and claimed a balance. The defence was that he had misconducted himself as their agent, and that the defendants were justified in dismissing him. The jury gave their verdict for the plaintiff for the whole amount of his claim plus 40*l.* compensation for wrongful dismissal; but, as the plaintiff had made no claim for wrongful dismissal, judgment was entered for him for the balance of account claimed. The defendants afterwards applied to the judge of the City of London Court for a new trial. The main ground of their application was that the judge had misdirected the jury on several important matters. This objection to the direction had not been taken during the course of the trial nor during the summing-up, but was made for the first time upon the application for a new trial.

S. T. Evans, K.C. (*F. Dodd* with him), for the defendants. The learned judge ought to have told the jury that, upon

the facts, the defendants had an absolute right to dismiss the plaintiff; but it was objected, and the objection was sustained, that the defendants had not taken the point of law at the trial. It could not have been taken then, and according to the authorities the defendants could not come directly to the High Court because it had not been taken. Accordingly, the point was taken upon the application for new trial. The learned judge was, however, of opinion that misdirection was a ground for applying to the High Court, and refused to grant a new trial. In this refusal he was wrong, for there was a clear misdirection, and the application should have been granted.

Giveen, for the plaintiff. Misdirection is a matter of law which can be raised at the trial of an action in the Court below, but it cannot be raised upon an application to that court for a new trial. Application can be made to a county court judge for a new trial on the ground of misdirection if that ground be taken at the trial before him, and not otherwise. Here the defendants seek to raise a point of law not raised at the trial: *Clifford* v. *Thames Ironworks and Shipbuilding Co.* (1) If a point of law be not raised in the county court there can be no appeal: *Smith* v. *Baker.* (2)

LORD ALVERSTONE C.J. In this case I think it is impossible to come to any other conclusion than that there has been a serious misdirection by the judge at the trial. He seems to have led the jury to think that circumstances which would clearly justify the dismissal of the plaintiff from his employment might be treated as not justifying it because of certain other matters which had no connection with them at all. The case must therefore go back for a new trial. I wish to add a few words with respect to what I understand to be the law and practice relating to applications in this Court for new trials in the county court. If the parties desire to come straight to this Court by way of appeal from the judgment of the county court judge they must take the point of law at the trial. If they desire to apply

(1) [1898] 1 Q. B. 314. (2) [1891] A. C. 325.

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to the county court judge for a new trial on the ground of misdirection they are entitled to do so, even though they have not interposed in the course of the summing-up; and upon his refusal to grant a new trial they are entitled to appeal to this Court. Speaking for myself, I think the latter is the better course to adopt, for I do not think it is a prudent thing, and certainly not in the interests of the orderly conduct of the trial, that there should be constant interruptions of the judge whose duty it is to direct the jury. Mr. Giveen has contended that it is a condition precedent to an application to the county court judge for a new trial on the ground of misdirection, and a fortiori to an appeal to this Court from a refusal by the county court judge to grant a new trial on the ground of misdirection, that the objection to the direction should have been taken at the trial. I do not understand that to be the law. The case of *Clifford* v. *Thames Ironworks and Shipbuilding Co.* (1), upon which he relied, I understand to have been a case in which the parties objecting to the direction, instead of applying to the county court judge in the first instance for a new trial, came direct to this Court by way of appeal from the judge at the trial, which is not the case here.

DARLING J. I am of the same opinion.

CHANNELL J. I am of the same opinion. I have no doubt that, inasmuch as when a party in a county court desires to move for a new trial on the ground of misdirection he has to go before the judge who is alleged to have misdirected the jury and before him alone, the motion is one which is not often made. But, as it has been held in *Clifford* v. *Thames Ironworks and Shipbuilding Co.* (1) that an appellant cannot come direct to this Court by way of appeal from the county court judge on the ground of misdirection unless he has taken the objection at the trial, it becomes the more necessary to make it quite clear that it is not too late to take

(1) [1898] 1 Q. B. 314.

the objection on an application to the county court judge for a new trial.

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Appeal allowed.

Solicitors for defendants: *Wynne-Baxter & Keeble.*
Solicitor for plaintiff: *Roland H. Ward.*

J. F. C.

STODDART *v.* HAWKE.

1901
Nov. 5, 6.

Gaming—House used for Betting—Receipt of Money beyond the United Kingdom—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

By s. 1 of the Betting Act, 1853, it is an offence to keep a house for the purpose of money being received by or on behalf of the keeper of the house as the consideration for undertakings to pay thereafter money on events relating to horse-races or games:—

Held, that to constitute an offence under that section it is not necessary that the money should be intended to be received at the house itself, nor need the intended place of receipt be within the United Kingdom.

CASE stated by an alderman of the City of London.

The appellant, Joseph Stoddart, was charged under s. 1 (1) of the Betting Act, 1853, with having on several dates between March 8 and April 2, 1901, kept an office at 10, Red Lion Court, Fleet Street, in the City of London, for the purpose of money being received by him or on his behalf as and for the consideration of undertakings or promises to pay or give thereafter money on events or contingencies of or relating to horse-races and the game of football.

(1) By s. 1 of the Betting Act, 1853, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise."

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At the hearing the following facts were proved or admitted: On and between the dates above mentioned the appellant was the owner of the said office and the registered proprietor of a newspaper called *Sporting Luck*, which was published weekly. The said office was the principal office at which the said newspaper was published and the business thereof conducted. Copies of the said newspaper, dated respectively March 8, March 15, March 22, and March 29, contained advertisements relating to what were called "coupon competitions"—that is to say, promises by the defendant to pay a certain specified sum of money to such persons as should correctly guess the result of a horse-race then about to be run, or of football matches then about to be played, and should write their guesses on certain forms called "coupons," and should send the coupons so filled up to the defendant, together with the sum of one penny in respect of each guess made. The said coupons were procurable at the office in Red Lion Court by intending competitors, either with or separately from the newspaper, free of charge. All the coupons filled up and despatched by the competitors, together with the remittances accompanying, were, in accordance with the instructions in the advertisements and the coupons, addressed to "*Sporting Luck*, Middelburg, Holland"; and, according to the instructions in the issue of the newspaper of March 8, remittances were to be made payable to the appellant, but according to the instructions in the later issues they were to be payable to George Stoddart, who was the appellant's son. Subsequently to the issue of March 8 remittances in the form of postal orders were sent addressed to "Joseph Stoddart, *Sporting Luck*, Middelburg, Holland," payable to the appellant, and were accepted for the competitions as well as those made payable and sent to G. Stoddart. Between March 8 and April 3 the authorities at the General Post Office cashed postal orders, payable either to the appellant or to G. Stoddart and returned from Holland, amounting to 9683*l*. English postal orders are not payable in Holland, and cannot be cashed except in this country. Among the postal orders produced at the hearing by the postal authorities as having been returned for payment through Dutch bankers, with whom

G. Stoddart had an account, were numerous orders identified as having been sent to the appellant and G. Stoddart for the said competitions. The competitions for which the said moneys were received were in some cases in respect of horse-races, and in others football matches, and they were described in the said newspaper as *Sporting Luck* contests, and the address in Holland was given as "*Sporting Luck*, Middelburg, Holland." One of the prize-winners was proved to have received his prize by a cheque drawn by G. Stoddart dated March 22, 1901, on an account in his name at the London and South Western Bank, Fleet Street.

Upon these facts the appellant contended that in order to bring the case within the Act it was necessary to prove that the appellant had used or kept the office at Red Lion Court for the purpose of money being received by the appellant at that office.

The alderman found as a fact that George Stoddart was acting at Middelburg as the agent for or as jointly interested with the appellant in the receipt of money posted to Middelburg as described, and that the appellant in fact had himself received some of the said postal orders; and he held that the said office, 10, Red Lion Court, Fleet Street, had been kept for the purpose of money being received contrary to the statute. He accordingly convicted the appellant, subject to a case for the opinion of the High Court.

Lord Coleridge, K.C. (*Shearman* and *Stutfield* with him), for the appellant. It is not enough that the appellant keeps an office here for the purpose of receiving money in Holland. It must be kept for the purpose of the money being received at the house itself. The history of the Betting Act, 1853, is set forth by Lord James of Hereford in *Powell* v. *Kempton Park Racecourse Co.* (1) It appeared that a practice had then sprung up of keeping houses for the purpose of ready-money betting. Lists were exposed to view in these houses giving the names of horses entered for different races, and any one who wished to back a horse deposited the sum of money he desired to risk

(1) [1899] A. C. 143, at pp. 191–2.

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with the person in attendance. It was with the object of suppressing these houses, the business of which consisted in the receipt of money at the houses, that the Act was passed. In *Cox* v. *Andrews* (1) Mathew J., in the course of his judgment, is reported in the *Law Journal* report to have said: "Cockburn's Act was directed to suppressing betting-houses, as appears from the preamble, and the keeping such houses and receiving money in advance *in them* is prohibited." But whether it is necessary that the money should be received at the house itself or not, it is at all events essential that it should be received within the United Kingdom. The purpose for which the house is kept must be illegal; but there is nothing to shew that the receipt of money for the purpose of a bet is illegal in Holland. It is not to be presumed that the Legislature intended to make that illegal which is not illegal by the law of the country where it is done. The provisions of s. 4 go to support this view. By that section any person acting on behalf of the owner of a betting-house who receives money as or for the consideration of an undertaking to pay thereafter money on the happening of an event relating to a horse-race, &c., shall be liable to a penalty. The receipt there aimed at must clearly be a receipt within the jurisdiction. It could not be contended that a person who had no interest in the bets could be convicted here merely because he received money on behalf of the appellant in Holland. Then, if so, the same construction must be put upon the term "received" in s. 1 as in s. 4, the language of the two sections being the same. But if a receipt within the jurisdiction is necessary, there is no such receipt here. The mere fact that the postal orders had to be returned to this country to be cashed is immaterial. If the money was received in Holland, which it undoubtedly was, it could not also be received here. There can be but one receipt once and for all.

[CHANNELL J. Is it not enough that the house is kept for any material part of a complicated transaction by which money is received?]

No. In *Davis* v. *Stephenson* (2), where the defendant, the

(1) (1883) 12 Q. B. D. 126; 53 L. J. (M.C.) 34. (2) (1890) 24 Q. B. D. 529.

keeper of a licensed house, allowed a betting-man who made bets near to it to deposit in the house the stakes which he received outside the house, it was held that as the money was received by the depositor outside and not inside the house, the defendant was not liable to be convicted of suffering the house to be used by the depositor for the purpose of money being received by him contrary to the Betting Act.

Avory, K.C. (*Mackay* with him), for the respondent. It is enough if the office is kept by the appellant for the purpose of money being received by him somewhere: where that receipt takes place is immaterial. If the appellant's contention that the money must be intended to be received at the house itself were correct, then, if the newspaper were to direct the competitors to pay their deposits, not at 10, Red Lion Court, where the newspaper was published and the coupons issued, but at another office of the appellant next door, he would have committed no offence. *Davis* v. *Stephenson* (1) is not in point. In that case there was no evidence that the licensed house was used for any part of the depositor's betting transactions. The receipt of the money was complete at the time that the depositor used the house. All that he did was to deposit the money there. It was just as if he had deposited it at his bankers. The dictum of Mathew J. in *Cox* v. *Andrews* (2) was unnecessary to the decision.

Lord Coleridge, K.C., in reply.

LORD ALVERSTONE C.J. I am of opinion that this conviction ought to be affirmed. I agree with and adopt the view expressed by Lord James of Hereford in *Powell* v. *Kempton Park Racecourse Co.* (3) as to the object of the Act; and if his exposition of that object is correct, then that this transaction is within the mischief aimed at by the Act no one can have the slightest doubt. It is only fair to say that Lord Coleridge did not attempt to deny that the case was within the mischief aimed at; but his contention was that the language of the Act was not wide enough to cover it, and that without undue

(1) 24 Q. B. D. 529. (2) 12 Q. B. D. 126; 53 L. J. (M.C.) 34.
(3) [1899] A. C. 143, at p. 192.

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straining of that language the case could not be brought within it. The defendant is charged under the second branch of s. 1 with having kept an office for the purpose of money being received by him or on his behalf as the consideration for undertakings of the kind therein prohibited. The facts in support of that charge are these: the defendant keeps an office at Red Lion Court, where his paper called *Sporting Luck* is published, and from that office are issued the coupons, without which he would not receive any of the money which he does receive. Those facts are, in my opinion, sufficient to bring the case within the section. I think that, having regard to the preamble of the Act and the judgments in *Powell* v. *Kempton Park Racecourse Co.* (1), the section is to be understood as prohibiting the keeping of a house for the purpose of the receipt of money wherever that receipt may be, and that it would defeat the obvious intention of the Legislature if after the words "for the purpose of any money or valuable thing being received" we were to read in the words "at that house." Otherwise, as was pointed out by Mr. Avory in the course of argument, if the whole transaction had been carried on at Red Lion Court, subject to this—that the defendant's customers had been requested, instead of paying their deposits into the defendant's office, to pay them to his banker round the corner—the defendant would have committed no offence.

I wish to add a few words with regard to the authorities. The case of *Davis* v. *Stephenson* (2) is, in my opinion, no authority against the view which we take. There an innkeeper was charged with permitting a betting-man to use the inn for the purpose of the receipt of money; but the evidence shewed that the betting-man received the money elsewhere, and only sent it to the house for the purpose of making up his accounts there. And in the *Law Times* report of that case (3) Lord Coleridge C.J. is reported to have said in the course of his judgment: "Mr. Poland has stated, and his case fails unless he can shew that it was so, that Hicks"—the betting-man—

(1) [1899] A. C. 143, at p. 192. (2) 24 Q. B. D. 529.
(3) 62 L. T. 436, at p. 438.

"received the money in the house of Davis with the knowledge and sanction of Davis, and that Davis suffered his house to be used for the purpose of Hicks receiving his money therein; and Mr. Poland admits that unless the facts of the case will make out that conclusion in point of law this conviction is bad." The mere permission by the innkeeper to the betting-man to make up his accounts and handle the money in the house could be no essential part of the system by which the latter was enabled to receive the money. With regard to the case of *Cox* v. *Andrews* (1), it is true that in the *Law Journal* report Mathew J. is represented to have said the object of the Act was to suppress betting-houses and prohibit "the keeping such houses and receiving money in advance in them." Those words do not appear in the judgment in the *Law Reports*, and, moreover, were not necessary to the decision. In any case I do not think we ought to regard them as an exhaustive statement, or to hold that the words "in them" are an authority that unless the money is actually received in the house, although the house is necessary upon the facts for the purpose of the receipt of the money, no offence can be committed. I am of opinion that in this case the alderman came to a right conclusion, and that the conviction must be affirmed.

DARLING J. I am of the same opinion. It is conceded by Lord Coleridge that the case is within the mischief aimed at by the Act; but he contends that the language is not wide enough to cover it, and that it is casus omissus. I do not agree. I think the words of the Act are wide enough. They do not say that the money must be received in the house; and I can see no reason why we should read any such limitation into the statute. It is said that the coupon competitions are conducted in Holland, and that before the defendant can be convicted it must be shewn that they are illegal in Holland. But the assumption that the competitions are wholly conducted in Holland is untrue. The issue of the coupons is an essential part of the competitions. Without the coupons

(1) 12 Q. B. D. 126.

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they could not be conducted at all. And the coupons are issued here.

CHANNELL J. I am of the same opinion. The question which we have to consider is whether what was done here is forbidden by the statute. What is forbidden is the use of a place for certain purposes, one of which purposes is the receipt of money as the consideration for undertakings of the kind therein mentioned. The statute was much considered in the case of *Powell* v. *Kempton Park Racecourse Co.* (1), and it was there pointed out, particularly by Lord James of Hereford, that what was prohibited was not the mere carrying on of a business of betting, but the localization of such a business. Now, it has already been decided in *Reg.* v. *Stoddart* (2) that this coupon system is a system whereby the owner of the premises receives money as the consideration for a promise to pay thereafter money in certain events. But that does not conclude the question whether the present case comes within the statute, because what has to be determined is whether the business conducted by the defendant is localized and for that reason rendered illegal. What is done here is that there is an office in this country from which are issued newspapers with an appendix to them called coupons. In my opinion those documents are an essential part of the system, and without them the money cannot be received. I do not think it is necessary that the actual receipt of the money should take place in the office. What is forbidden is the use of the house for "the purpose" of money being received, and I think the house is used for that purpose when there is done in it the thing which is the foundation of the whole transaction resulting in the receipt of money. The case seems to me precisely analogous to those cases in which it has been held that the prohibition against keeping open a public-house for the sale of intoxicating liquor during certain hours is infringed when there takes place within the prohibited hours any material part of the transaction of sale. The case of *Davis* v. *Stephenson* (3)

(1) [1899] A. C. 143. (2) [1901] 1 Q. B. 177.
(3) 24 Q. B. D. 529.

seems to me to have no bearing on the present question. I agree that the conviction must be affirmed.

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Appeal dismissed.

Solicitors for appellant: *Le Brasseur & Oakley.*
Solicitors for respondent: *Malkin & Co.*

J. F. C.

HERDMAN *v.* WHEELER.

1901

Nov. 15; *Dec.* 16.

Promissory Note—Inchoate Instrument—Negotiation—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 20.

The defendant, having agreed to borrow the sum of 15*l.* from A., signed and handed to A. a blank stamped paper which he authorized A. to fill up as a promissory note payable to A. and for the sum of 15*l.* only. The stamp upon the paper, however, was sufficient to cover a sum of 30*l.* A., in breach of his authority, fraudulently filled up the paper as a promissory note for 30*l.* and payable to the plaintiff; and he handed it to the plaintiff, who gave value for it without notice of A.'s breach of authority. A. misappropriated the proceeds. In an action by the plaintiff on the promissory note:—

Held, that the delivery of the note by A. to the plaintiff was not a negotiation of the note within the meaning of the proviso to s. 20, sub-s. 2, of the Bills of Exchange Act, 1882, so as to entitle the plaintiff to recover.

Quære, whether the payee of a note can under any circumstances be a holder of it in due course.

APPEAL by the plaintiff from a judgment of the judge of the Newcastle County Court in favour of the defendant. The action was by the payee against the maker of a promissory note for 30*l.* The defendant applied to one Anderson to lend him a sum of 15*l.*, which Anderson promised to do. The defendant, at Anderson's request, signed his name upon a blank stamped paper and handed it to Anderson, with authority to fill it up as a promissory note for 15*l.* payable to Anderson only. The paper in question was stamped with a ninepenny stamp, which was sufficient to cover a note for 75*l.* Anderson, having the defendant's signature to the note in blank, asked the plaintiff through the telephone if he would lend the

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defendant 25*l.* upon the defendant's promissory note for 30*l.* at a month. The plaintiff agreed to do so, and wrote a cheque for 25*l.*, payable to the order of the defendant, and left it with his wife to be exchanged for the promissory note. Anderson then sent the promissory note filled up for 30*l.*, with the plaintiff's name inserted as payee, by a clerk, and received the cheque. The plaintiff's cheque for 25*l.* was presented at the bank on which it was drawn with an indorsement purporting to be the defendant's, but which was not his. In the result the defendant received no part of the proceeds of the promissory note.

Arthur Powell, for the plaintiff. The question is which of two innocent parties is under the circumstances of the case to bear the loss; and the answer to it depends upon the construction to be placed on s. 20 of the Bills of Exchange Act, 1882. (1)

It is said on the part of the defendant that the proviso in the section as to negotiation does not apply as between the immediate parties to a promissory note. But that contention cannot be supported. All that the proviso requires is that the note shall, "after completion," be "negotiated to a holder in due course." Now s. 31 shews that all that is meant by "negotiated" is that the note shall be "transferred from one person to another in such a manner as to constitute the trans-

(1) By the Bills of Exchange Act, 1882, s. 20, "(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a primâ facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and in like manner, when a bill is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit.

"(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

"Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given."

feree the holder." Here the note was transferred to the plaintiff in such a manner as to constitute him the holder, for by s. 2 "holder" includes "the payee of a note who is in possession of it," and the plaintiff was payee in possession. Secondly, he was a "holder in due course," for he satisfied the conditions of s. 29 (1), the note being complete and regular on the face of it, and he having taken it without notice of any defect in the title of his transferor. Thirdly, the note was negotiated to him "after completion," for the instrument was completed when it was filled up with the amount and the name of the payee. Therefore the case falls exactly within the language of the proviso. It cannot be disputed that, if Anderson had put his own name in the note as payee and then indorsed it to the plaintiff, there could be no defence to the action, and yet the result to the parties would have been exactly the same. The defendant, by enabling Anderson to commit the fraud, ought to be the party to bear the loss. The proposition of Ashhurst J. in *Lickbarrow* v. *Mason* (2), that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," has recently been treated in the Court of Appeal as a sound expression of the law: *Farquharson Brothers* v. *King*. (3)

Bruce Williamson, for the defendant. There is no authority for the proposition that the proviso to s. 20 applies as between the immediate parties to a promissory note. The issue of a bill or note to the first holder stands on a different footing from the transfer of it from one holder to another. There was no negotiation of the note within the meaning of the proviso. Apart from the Act, the term "negotiation" means the

(1) By s. 29, sub-s. 1, "A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

"(*a*) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;

"(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

(2) (1787) 2 T. R. 63; 1 R. R. 425.

(3) [1901] 2 K. B. 697, at p. 708.

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transfer of rights under the contract contained in the instrument by one person to another. But the maker of a note has no rights to transfer. As between the immediate parties to it, a note is a mere simple contract. It has none of the incidents of negotiability until it has been transferred. Till then it does not require protection as part of the mercantile currency of the country. And the term is used in precisely the same sense in the Act. Sect. 31 shews that a bill is negotiated when it is "transferred from one person to another" in a certain manner. The negotiation of an instrument is distinguished from the delivery of it to the immediate payee, the technical term for which is "issue": see s. 2. The proviso to s. 20, moreover, requires that the negotiation should be after completion. But by s. 84 "a promissory note is inchoate and incomplete until delivery thereof to the payee." And it must be assumed that the word "complete" is used in the same sense in the two sections. Therefore, the negotiation here would have to be after delivery to the plaintiff. But that was not the case. The dictum of Ashhurst J. in *Lickbarrow* v. *Mason* (1) is too wide. It is negatived by the judgments of the Lords in *Scholfield* v. *Lord Londesborough*. (2)

Powell, in reply. "Completion" in s. 20 means completion as regards the document only, and does not import all the requirements of s. 84.

Cur. adv. vult.

Dec. 16. The judgment of the Court (Lord Alverstone C.J., Darling and Channell JJ.) was read by

CHANNELL J. This was an appeal from a judgment of the judge of the Newcastle County Court given for the defendant in an action by the payee against the maker of a promissory note for 30*l*., and the principal point involved is the construction of the 20th section of the Bills of Exchange Act. The facts are not in dispute. The conduct of each of the parties to the action appears to have been quite straightforward and honest, and the evidence of each of them has been accepted as true. The difficulties which arose were occasioned by the

(1) 2 T. R. 63; 1 R. R. 425. (2) [1896] A. C. 514.

fraud of one Anderson, who is now dead. The facts are as follows. Mr. Wheeler, the defendant, was a curate at Sunderland, and, being about to remove to Norfolk, he required a temporary loan of 15*l.* to pay the expenses of removing. He applied to Anderson to lend him the money, and Anderson promised to do so. The defendant, however, seems to have understood that Anderson proposed to get the money from some one else, and the name of the plaintiff Herdman was mentioned as a person who would lend it; but the defendant objected to borrowing the money himself direct from the plaintiff. The defendant gave to Anderson a promissory note payable to Anderson for 15*l.*, and expected to get the money from Anderson the next day. We think he must have expected that Anderson would have borrowed the money, and probably from the plaintiff. If he knew anything of business he must have understood that his promissory note would be indorsed by Anderson to the lender of the money. On the next day Anderson saw him and did not give him the money, but informed him that the promissory note was in some way wrongly made out, and gave it back to him, and it was burnt. In lieu of it the defendant gave to Anderson his signature on paper stamped with a ninepenny stamp, which would be sufficient for a note for 75*l.* This was done at a restaurant when the defendant was in a hurry, and he trusted Anderson to fill it up, but only authorized him to do so as a promissory note payable to himself and for 15*l.* only. Anderson promised to send the 15*l.* He did subsequently send a cheque of his own for 15*l.*, which, however, was dishonoured. Anderson having got the defendant's signature to the note in blank, communicated with the plaintiff through the telephone, and asked him if he was willing to lend the defendant 25*l.* upon his promissory note for 30*l.* at a month. He represented that the defendant was in urgent need of the money and was willing to pay the 5*l.* for the accommodation; but he further stipulated that if the money was repaid in a week 2*l.* only should be charged instead of 5*l.* The plaintiff agreed to the proposal, and it was arranged that Anderson should bring or send the promissory note and receive the money. The plaintiff, having to go out,

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wrote a cheque for the 25*l.* payable to the order of the defendant, and left it with his wife to be exchanged for the promissory note. Anderson then sent him the promissory note by a clerk, and received the cheque from the plaintiff's wife. The promissory note when received by the plaintiff's wife was filled up as a promissory note for 30*l.* with the plaintiff's name inserted as payee. It was on the face of it complete and regular in all respects, and the plaintiff had no notice that it had been signed in blank, or that Anderson had in any way acted without authority. The plaintiff's cheque for 25*l.* was presented at the bank on which it was drawn with an indorsement purporting to be the defendant's, but which was not his, and the indorsement appears to have been forged by Anderson. The defendant appears to have got cash from some one for Anderson's cheque for 15*l.*, but when it was dishonoured he had to take it up. In the result, therefore, he got no part of the proceeds of the promissory note. When the week elapsed the plaintiff wrote to the defendant on the matter; and then some correspondence took place in which the plaintiff and the defendant each stated the facts so far as they knew them. The defendant upon receiving the plaintiff's letter had some communication with Anderson, who promised to settle the matter, and gave him a receipt purporting to be a discharge of his liability; but Anderson did not settle with the plaintiff, and died within a few days and before the promissory note became due. This action was brought in the High Court, and, the defendant having got leave to defend, it was transferred to the Newcastle County Court. The judge on these facts gave judgment for the defendant.

The liability of the defendant appears to depend upon whether the case comes within the proviso at the end of the 20th section of the Bills of Exchange Act—that is, whether in this case the note was within the meaning of the words as used in that section, "after completion negotiated to a holder in due course." On the part of the defendant it was not denied on the argument before us that the plaintiff was a holder in due course, but it was said that the note was not negotiated to him, and that if it was it was not negotiated after completion. Since

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the argument we have been referred by counsel for the defendant to the case of *Lewis* v. *Clay* (1) as an authority that the plaintiff was not in this case a holder in due course. On the argument it was further said that s. 84 shews that the note was incomplete until the delivery to the plaintiff, and consequently, if it could be said to be "negotiated" to him at all, it was not "after completion," but either before or at most simultaneously with completion; but it was further said—and this we think is the substantial argument for the defendant—that it was never negotiated to the plaintiff, as he was the payee and an original party to the contract contained in the note, and did not become a party by transfer. It was contended that a bill or note is only negotiated when it is transferred from one holder to another, and for this s. 31 is referred to. In substance the argument for the defendant and the judgment of the county court judge in his favour comes to this—that the proviso in s. 20 can have no application as between the immediate parties to a note or bill. If this is the necessary meaning of the words used in the proviso, we must of course give effect to it and affirm the judgment for the defendant, for the Bills of Exchange Act is now the code of law on the subject, and in cases where it differs from the old law it prevails over the old law. But if the words used in the Act are fairly capable of being construed as meaning the same as the words used by judges previously to the Act in stating the law, it would be right to give them that meaning in the absence of anything to indicate a clear intention of the Legislature to alter the previous law. Further, by s. 97, sub-s. 2, the rules of the law merchant are to continue to apply to bills and notes except so far as they are inconsistent with the express provisions of the Act. It is therefore material to see what light the law on this subject before the Act throws on the case before us.

We find Bowen J. stating the law thus in *Garrard* v. *Lewis* (2): "I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is

(1) (1897) 67 L. J. (Q.B.) 224. (2) (1882) 10 Q. B. D. 30, at p. 35.

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intrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration (even if it be fraudulent and unauthorized) of the marginal figure vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered." Of course such a case as the present, where there was no marginal figure, but only verbal instructions to fill in 15*l.* as the amount, is an a fortiori case. It will be observed that the words " when the bill reaches the hands of a holder " are wide enough to cover the case of the payee, unless it could be contended that a payee was not a holder. Again, Lord Selborne in *France* v. *Clarke* (1) expresses the rule thus : " The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not ex facie fraudulent) as against a bonâ fide holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a bonâ fide holder." This statement would appear to include the case where the name of the person who became bonâ fide holder had been inserted as payee. The reported cases in which a holder, who had given value for a bill after it had become complete and regular on the face of it, has been held entitled to recover, notwithstanding that the bill had in fact been signed by the defendant in blank and had been filled up otherwise than in accordance with the defendant's authority, will, we believe, be found to be all cases where the holder was indorsee and not payee, but it is obvious that cases such as the present, where the payee's name was inserted without his knowing of the bill having been in blank, would be rare. The language of the judges seems wide enough to cover the case of payee as well as the case actually before them, but that is all that can be said. There are, of course, cases where the payee's name has been

(1) (1884) 26 Ch. D. 257, at p. 262.

inserted by himself, and where he has been entitled to recover, as *Crutchly* v. *Mann* (1), *Harvey* v. *Cane* (2), and *Scard* v. *Jackson* (3); but in these it seems that there had been nothing done in excess of the defendant's authority except the mere putting of the payee's name. In *Harvey* v. *Cane* (2) it was said that "anybody who gets the bill (i.e. one with the drawer's name omitted) fairly is primâ facie entitled to insert his own name as drawer"; and, if this wide statement is correct, it would seem that a payee stands in as good a position as an indorsee when he bonâ fide gives value for the bill; but in *Harvey* v. *Cane* (2) the Court also seem to have come to the conclusion that what was done came substantially within the defendant's authority.

As to the cases relied on by the defendant, on the argument before us:—in *Awde* v. *Dixon* (4) the form of the bill shewed that it had been prepared for signature by more than one person, so that the plaintiff had notice of the defect. *Scholfield* v. *Lord Londesborough* (5) differs from this, that there the bill was a perfect bill when the defendant signed it, and what was said as to forgery does not appear to apply to the case of a bill or note in blank when it was signed: see *London and South Western Bank* v. *Wentworth* (6), which case does not appear to have been dissented from in the House of Lords in *Scholfield's Case*. (5)

The cases quoted by the defendant on the argument do not appear, therefore, to help him very much; but, on the other hand, the investigation of the law before the Bills of Exchange Act appears to shew that there is no case which would be a distinct authority in favour of the plaintiff if the law were still as before the Bills of Exchange Act. The law has been stated by various judges in general terms in such a way as to cover the case, but they do not appear to have had their attention specially drawn to the point.

We therefore approach the consideration of the words used in the Act without any very clear guide from the previous

(1) (1814) 5 Taunt. 529.
(2) (1876) 34 L. T. (N.S.) 64.
(3) (1875) 34 L. T. (N.S.) 65, n.
(4) (1851) 6 Ex. 869.
(5) [1896] A. C. 514.
(6) (1880) 5 Ex. D. 96.

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state of the law; but we do rather expect to find the bonâ fide holder for value without notice, or the holder in due course as he is now called, fully protected. Passing now to the words of the 20th section of the Act, the 1st sub-section of that section shews that Anderson had a primâ facie authority to fill up this note; but that in this case is hardly important. The 2nd sub-section shews that, unless the case comes within the proviso at the end, the note is not enforceable against the defendant because it was not filled up strictly in accordance with the authority given. It was suggested on the argument that this first part of the 2nd sub-section would never be wanted if the proviso had the effect contended for by the plaintiff; but on consideration there seem to be cases which would arise fairly often in practice which would not be within the proviso, and where the first part of the 2nd sub-section would take effect. The proviso can never operate in favour of a person who knows the acceptance of the bill to have been in blank. If in the present case Anderson, instead of communicating through the telephone with the plaintiff, had brought the stamped paper signed by the defendant with him and had filled it up in the plaintiff's presence, the plaintiff would certainly have been put on inquiry as to Anderson's authority, and, by reason of the first part of the 2nd sub-section, could only have recovered if Anderson was acting strictly within his authority. So in all cases where the plaintiff has been allowed to recover on a bill in which he had inserted his own name as payee he would, we think, now have to shew that this was within the authority given by the defendant. This is in accordance with the cases before the Act, with the possible, though not clear, exception of *Harvey* v. *Cane*. (1) See *Hogarth* v. *Latham* (2), and the remarks on *Harvey* v. *Cane* in that case (3); see also per Lord Selborne in *France* v. *Clarke*. (4) Then comes the important proviso, "Provided that if any such instrument" (that is an instrument which has been either a simple signature on stamped paper, or a bill wanting in any material particular) "after completion is negotiated," &c.

(1) 34 L. T. (N.S.) 64.
(2) (1878) 3 Q. B. D. 643.
(3) 3 Q. B. D. at pp. 646, 647.
(4) 26 Ch. D. 257, at p. 262.

Now, it seems to us that completion here refers to completing the form of the bill, or supplying the wanting "material particular." It is, after it has been made complete and regular on the face of it, to take the words of s. 29, defining holder in due course.

We do not think the word "completion" as used in this proviso includes delivery. It is the form of the instrument which is being referred to, and not its ceasing to be inchoate and revocable and becoming an operative instrument, which is the matter referred to in the 84th section. But even if the bill could not be said to be completed unless delivered to some one, here it was delivered to the plaintiff, and, if what happened on his giving his cheque for it and becoming the holder for value is "negotiating it to a holder in due course," it may, we think, be said to be "negotiated after completion."

The real question is, Does "negotiated to a holder in due course" cover what was done in this case? The plaintiff undoubtedly became the holder of the bill for value when it was handed to his wife, and she gave over his cheque in exchange. It is true that the cheque was paid on a forged indorsement, but the 60th section of the Bills of Exchange Act authorizes the plaintiff's bankers to charge him with the money so paid; so that his money is gone, and the case, we think, is the same as if he had paid 25*l.* in cash for the promissory note. This brings us to the important words "negotiated to a holder in due course"; and it is necessary to consider the case of *Lewis* v. *Clay* (1), to which our attention has been called since the argument. In that case the late Lord Chief Justice said, in an action brought by the payee of promissory notes: "Further, an examination of sections 20, 21, 29, 30, and 38, relating expressly to bills, and sections 83, 84, 88, and 89, relating to promissory notes, will make it clear that 'a holder in due course' is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated. In the present case the plaintiff is named as payee on the face of the promissory note, and therefore is one of the immediate parties. The promissory notes have, in fact, never been negotiated within the meaning

(1) [1897] 67 L. J. (Q.B.) 224, at p. 227.

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of the Act. I desire to say here that, even if the plaintiff were 'holder in due course,' it would, in my judgment, make no difference in the result." The Chief Justice there gave his judgment really on the same ground as that on which *Foster* v. *Mackinnon* (1) was decided, and at the end of his judgment he again refers to this question, and says that it follows a fortiori that the plaintiff as a named payee cannot recover. It is quite clear, therefore, that the expression of opinion of the late Lord Chief Justice that a payee was never a holder in due course was a dictum only, and, moreover, as his remarks on the other part of the case appear quite unanswerable, the case could not well have been appealed, and, in fact, was not appealed; so that his dictum could not well be questioned in that case. It appears to us that the late Lord Chief Justice overlooked the definition of holder in s. 2, which is, "'Holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." Therefore, in s. 29, it is necessary to read holder as including payee as well as indorsee, and to read it "a holder in due course is a payee or indorsee who," &c. That being so, the only words in s. 29 which can be said to indicate that a payee cannot be a holder in due course are those in sub-s. (*b*): "and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." But if the word "payee" had been expressed in the earlier part of the section, it would be clear that this means "if negotiated to him he had at the time no notice," &c. On the whole, therefore, we are not prepared to hold that a payee of a note can never be a holder in due course; but it is, as it seems to us, just as unnecessary for us to decide that question as it was for the late Lord Chief Justice to do so on the case before him.

The real point in the present case after all is, Can we hold that this note was "negotiated" to the plaintiff within the meaning with which the words are used in the proviso to the 20th section? And as to this, we certainly have the opinion of the late Lord Chief Justice that a delivery to a payee for value is not a "negotiating" within the meaning of the Act. In

(1) (1869) L. R. 4 C. P. 704.

the 31st section it is said, "a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." Does this mean only from one person who is holder to another, or may the person transferring be an agent in possession of the bill otherwise than as holder, whose delivery constitutes the receiver a holder? And even if that cannot be the meaning in the 31st section, may it not be possible to say that in the 20th section "negotiated to a holder in due course" means no more than delivered to a person in such a way that he thereupon becomes a holder in due course? This is the argument of Mr. Arthur Powell for the plaintiff, and he quotes from the Imperial Dictionary a meaning of "negotiate" which might cover the present case. He also points out that, if this note had been payable to Anderson's order and indorsed by him to the plaintiff, or if it had been by the form in which it was drawn, or by a blank indorsement, payable to bearer, the plaintiff could clearly have recovered on it. If the production by Anderson of the promissory note in either of those forms would have made it unnecessary for the plaintiff to inquire into Anderson's authority to deal with it, it certainly is odd that the production of a note with plaintiff's own name in as payee should be a matter which plaintiff must inquire into and ascertain the extent of Anderson's authority before he could safely take it. The fact that plaintiff's name was there would be more likely to lull suspicion on his part than to arouse it. Mr. Powell contends that the present case clearly comes within the mischief which the proviso in the 20th section was intended to meet, and suggests that we should not be straining the words in putting on them the meaning for which he contends. On the other hand, we have to deal with the points raised by Mr. Bruce Williamson, in his argument for the defendant, that the issuing of a bill or note to the first holder stands on a different footing altogether from the transfer of it from one holder to another, because, when the first holder takes it, it has not become part of the mercantile currency of the country, to use an expression found in some of the cases. He contends that the rule that one holder of a negotiable instrument can give a

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better title to it than he himself possessed is based upon the view that negotiable instruments are currency, and that it is on their passing from hand to hand, and not on their coming into being, that negotiable instruments acquire their special validity in the hands of a holder in due course. Even if the payee of a note may be a holder in due course, the question whether he is or not depends upon the actual state of facts as between him and the maker of the note; and the contract between the payee and the maker, though no doubt it has some incidents, such, for instance, as days of grace written into it by the law merchant, yet is governed more by the ordinary law of contracts than by the law merchant, and in particular that the element of negotiability in no way enters into the contract between maker and payee. There is much to support this argument in the Bills of Exchange Act. For instance, delivery to the payee being required to complete the contract, it is said in s. 21, sub-s. 2, that "as between immediate parties, and as regards a remote party other than a holder in due course, the delivery (*a*) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing as the case may be." Payees and holders not in due course are, therefore, put on the same footing as regards proof of authority of the person handing them the bill. In the present case, therefore, the delivery of the note to the plaintiff must, in order to enable him to recover, be under the authority of the defendant. It certainly was not so delivered by the defendant's actual authority, and cannot be said to have been delivered under his authority by reason of the ostensible authority with which Anderson had been clothed (to use Lord Bowen's words) by the signature in blank. Mere possession of a promissory note complete and regular on the face of it, and payable to a named payee, would not be conclusive evidence that the maker had given authority to the person in whose possession it was to deliver it to the payee, because the facts might possibly be as in *Baxendale* v. *Bennett* (1), or as in *Foster* v. *Mackinnon* (2), or *Lewis* v. *Clay*. (3) As to this we think that, if the note had been

(1) (1878) 3 Q. B. D. 525. (2) L. R. 4 C. P. 704.
(3) 67 L. J. (Q.B.) 224.

placed by the maker in another person's hands with authority to deal with it in some way or other, that would be sufficient to make a delivery under the authority. A question very similar to this is dealt with by Vaughan Williams L.J. at some length in his judgment in the recent case of *Farquharson* v. *King* (1), where he deals with the cases of *Henderson* v. *Williams* (2) and *Brocklesby* v. *Temperance Building Society*. (3) If here the defendant had signed the note in the form it ultimately took as a promissory note for 30*l*. payable to the plaintiff, but had instructed Anderson only to deliver it to the plaintiff on the plaintiff giving him 29*l*. for it, we think that, if Anderson had delivered it contrary to those instructions in exchange for 25*l*. only, it would have been a good delivery "under the authority" of the defendant to satisfy the 21st section. It would not have been necessary for the plaintiff to inquire in that case as to any limit of Anderson's authority; but it is not so clear that it was not necessary for him to do so on the facts of this present case, because there does not seem to have been any actual authority by the defendant to Anderson to deal with the note at all. He had nothing but that authority which the defendant conferred by signing his name on stamped paper—that is to say, only his authority which the law merchant, or now the Bills of Exchange Act, attributes to that signature. Anderson, if agent of the defendant at all, was only agent to fill up the paper, and, if the question were to be determined altogether apart from the law merchant and the Bills of Exchange Act, we should have to say that there was here no binding contract at common law whereby the defendant promised the plaintiff that, if the plaintiff would give 25*l*. to Anderson for the defendant, he, the defendant, would pay 30*l*. to the plaintiff in a month.

We have been very reluctant to come to the conclusion that the judgment in favour of the defendant in this case was right, because it appears dangerous even to cast any doubt upon a payee's right to recover when he has taken a bill or note complete and regular on the face of it honestly and for value;

(1) [1901] 2 K. B. 697, at p. 713. (2) [1895] 1 Q. B. 521.
(3) [1895] A. C. 173.

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but, after carefully considering the matter, we have come to the conclusion that we should be unfairly straining the words if we did not hold that "negotiated" in the proviso at the end of the 20th section meant transferred by one holder to another. It is to be observed that the Bills of Exchange Act in s. 2 defines "issue" as meaning "the first delivery of a bill or note complete in form to a person who takes it as holder." Here Anderson clearly issued the note to the plaintiff within the meaning of this definition. There is therefore a technical word defined and used in the Act to mean that which Anderson did here, and the appropriate words to have used in the proviso to s. 20, if it had been intended to include this case, would have been "if such instrument after completion is issued or negotiated to a holder in due course." Those are not the words, and, although we think that the present case might possibly have been decided in the plaintiff's favour before the Bills of Exchange Act was passed, we think that we cannot consistently with the meaning of "issue" and "negotiate" in the Act say that the present case is covered by the words used in the proviso. That being so, it falls within the first part of the 2nd sub-section of s. 20; and as the authority of the defendant was not strictly followed he is not liable.

We think, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Francis Miller & Steele, for Dickinson, Miller & Dickinson, Newcastle-upon-Tyne.*

Solicitors for defendant: *Stokes & Stokes, for Criddle & Criddle, Newcastle-upon-Tyne.*

J. F. C.

GENERAL ACCIDENT ASSURANCE CORPORATION *v.* NOEL.

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Dec. 11.

Principal and Agent—Agreement by Agent not to interfere with Business after ceasing to be employed—Liquidated Damages—Injunction—Election.

An assurance company appointed an agent, and by the terms of the agreement between them it was provided that in the event of the agent ceasing to act for the company he should not give information as to the company's connections, or interfere directly or indirectly with their business, or represent any other company doing similar business, within a radius of fifty miles from the head-quarters of his agency for one year from the date of his ceasing to act, and that in case of breach he should pay the company 100*l.* as ascertained and liquidated damages:—

Held, that the company could not, upon the agent's breach of agreement, claim an injunction as well as the 100*l.* liquidated damages, but must elect between the two remedies.

ACTION tried before Wright J. without a jury.

The plaintiffs claimed—(1.) an injunction restraining the defendant from giving information about the plaintiff corporation's connections, or from interfering either directly or indirectly with the business of the plaintiff corporation, or from representing any other corporation doing a business similar to the plaintiff corporation, either directly or indirectly, within a radius of fifty miles from the defendant's head-quarters at Oxford within one year at least from the date of the defendant ceasing to receive remuneration of any kind from the plaintiff corporation; (2.) 100*l.* by way of ascertained and liquidated damages.

By an agreement dated January 15, 1900, made between the plaintiffs, the General Accident Assurance Corporation, Limited, of Perth, of the one part, and the defendant of the other part, the defendant was appointed to the office of inspector of agents, with head-quarters at London or elsewhere as the plaintiffs should determine; and it was provided in clause 7 of the 1st schedule thereto that, if the defendant should cease to act at any time under the agreement for the plaintiffs, he thereby bound himself and agreed not to give any information about the plaintiffs' connections, or interfere

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either directly or indirectly with the business of the plaintiffs, or to represent any other corporation doing similar business to the plaintiff corporation, either directly or indirectly, within a radius of fifty miles from his head-quarters within one year at least from the date of his ceasing to receive remuneration of any kind from the plaintiffs; and in case of the breach of the agreement in that behalf the defendant should pay to the plaintiffs a sum of 100*l.* by way of ascertained and liquidated damages.

The defendant after the date of the agreement entered into the plaintiffs' employment, and afterwards took up his head-quarters at Oxford, and with the plaintiffs' consent represented them from his head-quarters. On March 7, 1901, the plaintiffs determined the agreement and the defendant ceased to act under it, and ceased to receive remuneration from the plaintiffs. Since March 7, 1901, the plaintiffs discovered that the defendant had broken his agreement by interfering both directly and indirectly with the plaintiffs' business, and then represented the Rock Life Company, which was doing a business similar to the plaintiffs', within a radius of fifty miles of Oxford.

By his defence the defendant admitted the agreement, and contended that upon its true construction the 100*l.* referred to as ascertained and liquidated damages was in point of law a penalty, and that he was only liable for the actual damages suffered by the plaintiffs owing to any breach; that the provisions of the agreement were void as in restraint of trade; that the plaintiffs had wrongfully dismissed the defendant from his employment, and had thereby put an end to and repudiated the agreement. The defendant admitted the breaches referred to in the statement of claim, but contended that they were committed after his wrongful dismissal. Further, that the plaintiffs were not entitled to recover liquidated damages and at the same time have the defendant restrained by injunction.

Danckwerts, K.C., and *Kisch*, for the plaintiffs. The plaintiffs have a right to the 100*l.* liquidated damages as well as to

an injunction; and the admissions of breaches by the defendant supports this contention. Formerly, if a covenantee recovered damages at law, he could not get an injunction in equity, but was put to his election. But where the covenant is not to do a particular act, and a penalty is annexed to the doing of the act, the payment of the penalty does not authorize the act, and the Court will grant an injunction: *French* v. *Macale*. (1) The present case comes to this: Is the payment of 100*l*., if the plaintiffs exact it, to enable the defendant to do things he has covenanted not to do? In *Robb* v. *Green* (2), where the defendant copied names and addresses of customers from his master's order-book, his conduct was held to be a breach of an implied term of the contract of service, in respect of which the plaintiff was entitled to damages and to an injunction. The obvious meaning of the agreement in the present case is that the defendant is not to do the acts complained of; that if he do them he is to pay the 100*l*. liquidated damages; and that the plaintiffs are still and notwithstanding such payment entitled to their injunction.

Rowlatt, for the defendant. Upon the authorities the plaintiffs cannot have an injunction as well as liquidated damages: *Sainter* v. *Ferguson* (3); *Carnes* v. *Nesbitt* (4); *Howard* v. *Woodward*. (5) Here the 100*l*. liquidated damages is to cover all possible breaches of the whole agreement. In *Young* v. *Chalkley* (6) 20*l*. was to be the penalty for breach of an agreement to abstain from carrying on a butcher's business within two miles, and it was held that the 20*l*. was sufficient satisfaction for the breach, and no injunction would be granted. If the Court hold that the plaintiffs are bound to elect between liquidated damages and an injunction, the defendant prefers to submit to an injunction.

Danckwerts, K.C., in reply. If the defendant's contention be right, he was by the agreement licensed to give away the

(1) (1842) 2 D. & War. 269, L. C. Sugden, p. 276.
(2) [1895] 2 Q. B. 315.
(3) (1849) 1 Mac. & G. 286.
(4) (1862) 7 H. & N. 778.
(5) (1864) 34 L. J. (Ch.) 47.
(6) (1867) 16 L. T. 286.

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plaintiffs' interest on payment of 100*l*. If the Court put the plaintiffs to their election, they will abandon the 100*l*. liquidated damages and take the injunction.

WRIGHT J. It is agreed that this is a case in which an injunction can be granted; but the question is whether the plaintiffs are entitled, under the terms of the 7th clause of the 1st schedule to the agreement, to a double remedy—that is to say, to 100*l*. as liquidated damages for past breaches as well as to an injunction for the future.

The cases are not in a very satisfactory condition on this point. The judgments of the Court in *Cole* v. *Sims* (1) seem rather to qualify the view that payment of liquidated damages excludes the jurisdiction of the Court to grant an injunction, and to sustain the notion that a covenantee may be entitled to both. However, in that case the attention of the Court was not apparently called to *Sainter* v. *Ferguson*. (2)

The conclusion I have arrived at is that the current of authority from *Sainter* v. *Ferguson* (2) down to *Howard* v. *Woodward* (3) and *Young* v. *Chalkley* (4) is to the effect that if a plaintiff take liquidated damages he cannot get an injunction. I think the cases I have mentioned go to shew that the present plaintiffs have an option to elect between but cannot adopt both remedies. If they elect to take liquidated damages there is no room for an injunction, for the 100*l*. damages is all they are entitled to. If, on the other hand, they elect, as they do here, to take an injunction, they may have it, but they cannot have judgment as well for the 100*l*. liquidated damages.

Judgment accordingly.

Solicitors for plaintiffs: *Beyfus & Beyfus.*

Solicitors for defendant: *Trower, Still, Freeling & Parkin.*

(1) (1854) 23 L. J. (Ch.) 258.
(2) 1 Mac. & G. 286.
(3) 34 L. J. (Ch.) 47.
(4) 16 L. T. 286.

J. F. C.

[BEFORE THE RAILWAY AND CANAL COMMISSIONERS.]

THE LANCASHIRE BRICK AND TERRA COTTA COMPANY *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

1901
Dec. 5.

Railway—Sidings and Collateral Branches—Connection—Injury to Railway and Inconvenience to Traffic—Inclined Plane—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 76—*Construction.*

Siding owners have, by s. 76 of the Railways Clauses Consolidation Act, 1845, a right to call upon railway companies to make necessary openings in their rails for effecting communication between sidings and the line of railway; and the refusal by a railway company to make such connection, except upon the terms of a special agreement to be entered into on the part of the siding owner, is a contravention of the section.

Questions of "injury to the railway and inconvenience to traffic," non-existent at the moment, but which might come into existence owing to the extra traffic from the sidings, are to be dealt with when they arise.

The expression "inclined plane" in s. 76 refers to an incline incompatible with the reasonable insertion of a connection at the junction of the particular siding, and an incline on a gradient of 1 in 96 or 98 is not within the meaning of the section.

APPLICATION under the Railway and Canal Traffic Acts, 1854, 1873, and 1888, and s. 76 of the Railways Clauses Consolidation Act, 1845 (1), for an order enjoining the defendants

(1) Sect. 76: "And be it enacted, that this or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway, but under and subject to the provisions and restrictions of an Act passed in the sixth year of the reign of Her present Majesty, intituled '*An Act for the better regulation of railways, and for the conveyance of Troops*'; and the company shall, if required, at the expense of such owners and occupiers and other persons, and subject also to the provisions of the said last-mentioned Act, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway and without inconvenience to the traffic thereon; and the company shall not take any rate or toll or other moneys for the passing of any passengers, goods or other things along any branch so to be made by any such owner or occupier or other person; but this enactment shall be

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to renew the communication between the applicants' sidings and the defendants' railway as the same was theretofore used and enjoyed, or otherwise to make such openings in their lines of rails and lay down such additional lines of rails as might be necessary to effect communication between the sidings and their railway.

The applicants manufactured bricks at Baxenden, in Lancashire, on land which adjoined the defendants' railway. They had laid down on their land collateral branches of railway or sidings which communicated with the railway by additional lines of rail laid on the defendants' land. Their sidings and additional lines were laid down at the cost of the applicants in pursuance of an agreement in writing between the applicants and the defendants dated September 17, 1894, by which it was provided (inter alia) that the applicants or the defendants might at any time after the expiration of five years from the date thereof, on giving six months' notice in writing, determine the agreement, and that thereupon so much of the lines of rail as were on the defendants' land might be removed. The applicants, by reason and on the faith of the facilities afforded by their siding and connection, had developed a large business which could not be carried on without such facilities.

On June 16, 1900, the defendants gave to the applicants notice in writing to determine the agreement at the expiration of six calendar months therefrom.

The applicants claimed to be entitled to have so much of the siding or branch railways as were upon the applicants' land connected with the railway of the defendants under s. 76 of the Railways Clauses Consolidation Act, 1845.

By letter dated July 5, 1901, the applicants gave to the defendants notice in the following terms: "It only remains for us to give you notice by virtue of s. 76 of the Railways

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subject to the following restrictions and conditions; (that is to say,)

"No such branch railway shall run parallel to the railway.

"The company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or bridge nor in any tunnel. . . ."

Clauses Act, 1845 (as we do hereby), that we require a communication from our private siding to your company's rails. As the present connection is safe as regards the public, without injury to the railway, and without inconvenience to the traffic thereon, we submit that to sever it would cause needless inconvenience and expense; so that, if you deny our right to the connection, we will on hearing from you to that effect at once take the necessary steps to test the question, and will ask you, pending the decision, to allow the physical communication to remain as it is." By refusing to afford such communication with their railway the defendants, as the applicants alleged, had contravened the provisions of s. 76 of the Railways Clauses Consolidation Act, 1845.

By their answer the defendants alleged that the point at which the applicants had requested them to make openings in their line of railway to make a communication with sidings upon the applicants' land was on an inclined plane, the gradient of which was 1 in 96, and the defendants could not be required to make the openings. The communication between the sidings on the applicants' land and the defendants' railway could not be made for the purposes for which the applicants were entitled to require it to be made under s. 76 of the Railways Clauses Consolidation Act, 1845, with safety to the public, or without injury to the railway, or without inconvenience to the traffic thereon. The defendants' railway was at the point of the proposed communication, one over which a large volume of traffic passed, and any user by the applicants of the communication between their sidings and the railway for the purpose of bringing carriages to, from, or upon the railway, the only purpose for which the applicants were entitled to have the proposed communication made, would be dangerous to the public and would seriously inconvenience the traffic using that portion of the defendants' railway. The defendants also alleged that the applicants claimed and intended that the proposed communication might and should be used, not only for the applicants' traffic, but also for the traffic of any other company or person whom they might permit to use the siding on their land; that the applicants further claimed that the

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defendants would be bound to receive, forward, and deliver at, to, or from the siding by means of the communication the traffic of any such company or person as well as the traffic of the applicants. Such user would be dangerous to the public, injurious to the railway, and inconvenient to the traffic thereon; and the defendants could not, with safety to the public or without injury to the railway or inconvenience to the traffic, receive, forward, and deliver at, from, or to the siding, by means of the communication, the traffic of such other companies or persons as well as the traffic of the applicants.

Balfour Browne, K.C., and *Whitehead*, for the applicants. The question is whether when a railway company has been requested, under s. 76 of the Railways Clauses Consolidation Act, 1845, to make openings for the connection of sidings, it can decline to do so; and whether or not an adjoining owner is not entitled to maintain a siding as a branch of the railway. The defendants' fear appears to be that the applicants should make a huge station, and bring too much traffic over their railway. It is quite obvious that "inclined plane" in s. 76 does not mean a mere gradient of 1 in 96 or 1 in 98, as is the case here. The applicants are quite willing that the defendants should do as they have done hitherto, and pick up traffic at their convenience. The applicants have a right to have their traffic taken from the siding and taken away by the defendants' railway unfettered by the agreement railways have hitherto insisted upon, otherwise every siding in the country could be shut up: *Cobeldick* v. *London and North Western Ry. Co.* (1); *Richard* v. *Great Western Ry. Co.* (2) [Cases decided in the Court of Session of *Cowan* v. *North British Ry. Co.* (3) and *Pollock* v. *North British Ry. Co.* (4) were discussed, and an English case of *Powell Duffryn Steam Canal Co.* v. *Taff Vale Ry. Co.* (5) was distinguished.] The applicants are not bound to restrict the user of their siding to their own traffic.

C. A. Russell, K.C., and *Moon*, for the defendants. The

(1) *The Times*, Oct. 28, 1890.
(2) *The Times*, Nov. 24, 1900.
(3) (1901) 3 F. 677.
(4) (1901) 3 F. 727.
(5) (1874) L. R. 9 Ch. 331.

defendants are willing to renew their agreement, and to act in future as in the past so long as the applicants add no greater volume of traffic to the main line, by the user of their siding, than has heretofore existed. The applicants are not satisfied with the ordinary siding agreement, and claim a right to connection under s. 76, which was never contemplated by the Legislature. The gradient of 1 in 96, or, as now alleged, 1 in 98, is sufficient to cause danger to loaded trucks, which would be liable to run away unless skilfully handled. It is a serious and practical variation from the level. Again, as regards s. 76, this connection cannot be allowed without injury to the defendants' railway and inconvenience to the traffic. By the Railways Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 12, the power of making branch lines entering into main lines may be regulated by the Board of Trade, if any such right of entry cannot be exercised without seriously endangering the public safety. Therefore, it is clear that the exercise of the power of bringing carriages by a siding to and from a railway is subject to limitation. Here no such powers can be exercised without serious danger, and the applicants have no right to demand the connection of their siding under s. 76 of the Act of 1845. The defendants are willing to enter into the ordinary siding agreement, and are prepared to place the applicants on the same footing as all other siding owners. But the applicants can establish no right under s. 76; and, if they fail to do so under s. 76, they fail altogether, and are relegated to the agreement railway companies have hitherto conceded to siding owners, because no other act imposes the making of a siding connection upon railway companies. Therefore, there is no power to order the connection at all.

[Evidence was called to prove that the defendants had to reduce loads on an up gradient of 1 in 98, and that a load on the same down gradient would be dangerous.]

Balfour Browne replied.

WRIGHT J. Treating this application for the present as we must treat it, as an application under s. 76 alone, we think that the applicants are clearly entitled to have such a

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connection made as that which they propose. No modifications of detail have been suggested by the defendants. The defendants have objected on three grounds: first, that it is an inclined plane; second, that if used as the applicants intend, or propose or claim the right to use it, the siding will interfere too seriously with their own traffic. We must first deal with these two grounds. As regards even an inclined plane I have a strong impression, which I think the rest of the Court shares, that if the matter were inquired into historically, as it might be, with the view of discovering what was the meaning of the term "inclined plane" in the Railways Clauses Act, the result would be that we should obtain from the engineering witnesses who are alive now that an inclined plane meant an inclined plane worked in a different way from ordinary sections of a railway which are worked by common locomotives. However that may be, we do not think that this incline of 1 in 96, or 1 in 98 as it is now stated to be, can be an inclined plane within the meaning of the section. The section cannot possibly be understood as meaning that every mathematically inclined plane must be an impossible site for a siding. It must be so inclined as to be incompatible with the reasonable insertion of a junction of this sort. The evidence here is that there are sidings with a connection of this kind at a considerable number of places on a gradient not materially worse than this, and that, although such a gradient may require special precautions for the safe working of the traffic, no danger is found if these precautions are taken.

On the second point, I do not think the question really arises on this section whether the applicants can or cannot carry traffic of persons other than themselves; if they have a right to carry the traffic of those other persons, it seems to me that, according to the doctrine laid down in *Hughes* v. *Chester and Holyhead Ry. Co.* (1), the applicants have an absolute right to have a connection made, unless one of the statutory objections mentioned in the section would apply. The third ground is based on the words of s. 76, "in places where the communication can be made with safety to the public and without injury

(1) (1861) 31 L. J. (Ch.) 97.

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to the railway, and without inconvenience to the traffic thereon." We have already in the case of *Richard* v. *Great Western Ry. Co.* (1) gone some way towards expressing an opinion that those words probably refer to what may broadly be described as a difficulty depending on engineering conditions. They probably refer to difficulties which can be proved as existing at the time when the question arises, and the time when the connection is made, and not to difficulties which, although non-existent then, may become existent by reason of the volume of traffic afterwards. We see no reason to take a different view now; but, in any case, I do not think it is proved that, in any reasonable view of the meaning of the section, there is such inconvenience to the traffic as ought to be taken into consideration here. It must be borne in mind that this is a passenger line, as I understand, and the Board of Trade will not pass these openings and allow the points to be used unless their inspector be satisfied that they can be used without danger to the public.

It seems to me here that the applicants are entitled to have this connection made, apart from any question as to the mode of dealing with it. These are questions we cannot deal with at present. It may be that the railway company will find that there is no occasion to raise these questions. If they are raised, they can easily be put into shape for determination.

SIR F. PEEL and VISCOUNT COBHAM concurred.

Judgment for applicants.

Solicitors for applicants: *Neish, Howell & Macfarlane, for B. T. Westwell, Accrington.*

Solicitors for defendants: *Woodcock, Ryland & Parker, for Moorhouse, Manchester.*

(1) *The Times*, Nov. 24, 1900.

J. F. C.

C. A.
1901
Nov. 27.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL *v.* THE EARL OF SELBORNE.

Revenue—Succession Duty—Settlement—Power to appoint Settled Estate—Exercise of Power—Interest of Appointee under Settlement—New Title under Appointment—Acceleration of Succession—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

By a settlement made by a father on the marriage of his son, who was a party to the deed, an estate was conveyed by the father to trustees to such uses as the father and son should by deed jointly appoint, and in default of and until such appointment to the use of the father for life, and after his decease to the son in fee simple in case he should survive his father; but if he died in the lifetime of his father leaving a son who should attain the age of twenty-one years, then to the use of that son, and, if there was no such son who attained the age of twenty-one years, then to the settlor in fee simple. By a subsequent deed the settlor and his son, in exercise of the power of appointment in the settlement, jointly appointed the estate to the son in fee. On an information claiming succession duty:—

Held, that the son took the estate by a new title under the deed of appointment, and not by a succession the title to which had been accelerated by the surrender or extinction of any prior interest within the meaning of s. 15 of the Succession Duty Act, 1853, and that succession duty was not payable.

Appeal from a decision of the King's Bench Division on an information by the Attorney-General, from which the following facts appeared:—

By an indenture dated October 26, 1883, and made between the Earl of Selborne of the first part, the defendant, then Viscount Wolmer, the only son of the Earl of Selborne, of the second part, the Marquess of Salisbury and Lady Maud Cecil of the third part, and trustees of the fourth part, reciting that the Earl of Selborne was seised of the freehold hereditaments thereinafter described for an estate of inheritance in fee simple in possession, and was possessed of the leasehold hereditaments thereinafter described for the residue of a term of 2000 years, and reciting that a marriage had been agreed upon between

Viscount Wolmer and Lady Maud Cecil, and reciting an agreement to settle the said freehold and leasehold premises, it was witnessed that in pursuance of the agreement, and in consideration of the intended marriage, the Earl of Selborne as settlor, with the approbation of Viscount Wolmer and Lady Maud Cecil, thereby conveyed unto the trustees the manor or lordship of Temple Sotherington, and certain capital and other messuages, farms, lands, tenements, and other freehold hereditaments which, with the leasehold premises hereinafter assigned, together formed an estate commonly known as the Blackmoor estate, and were specified in the schedule thereunder written, to hold unto the trustees, to the use of the Earl of Selborne, his heirs and assigns, until the intended marriage should be solemnized, and thereafter to such uses, upon such trusts, and with and subject to such powers, provisoes, agreements, and declarations as the Earl of Selborne and Viscount Wolmer should by any deed or deeds with or without power of revocation and new appointment from time to time jointly direct, limit, or appoint, but nevertheless any and every such appointment should, during the joint lives of Viscount Wolmer and Lady Maud Cecil, be subject to her consent in writing, and in default of and until such direction, limitation, or appointment, and so far as no such direction, limitation, or appointment should extend, to the use of the Earl of Selborne and his assigns for his life without impeachment of waste, and from and after his decease to the use of Viscount Wolmer in fee simple in case he should survive the Earl of Selborne; and if Viscount Wolmer should die in the lifetime of the Earl of Selborne and should leave a son or sons who should have attained or should attain the age of twenty-one years, then to the use of the son of Viscount Wolmer who should first or alone attain that age. But if Viscount Wolmer should die in the lifetime of the Earl of Selborne and leave no son who should have attained or should attain the age of twenty-one years, then to the use of the Earl of Selborne in fee simple. And it was further witnessed that the Earl of Selborne thereby assigned unto the trustees all that parcel of land therein described for the residue then unexpired of the

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said term of 2000 years, upon the like trusts as nearly as the different tenure and quality of the premises and the rules of law and equity would permit.

By an indenture dated September 29, 1894, and made between the Earl of Selborne and Viscount Wolmer of the first part, Beatrix Maud, wife of Viscount Wolmer, thereinafter called Lady Maud Wolmer, of the second part, the Earl of Selborne of the third part, and Viscount Wolmer of the fourth part, reciting the hereinbefore stated indenture and the solemnization of the marriage between Viscount Wolmer and Lady Maud Wolmer, and reciting that the Earl of Selborne and Viscount Wolmer, with the consent of Lady Maud Wolmer, were desirous of exercising the joint power of appointment as to part of the Blackmoor estate in the manner thereinafter appearing, it was witnessed that, in exercise of the power given to them as aforesaid, the Earl of Selborne and Viscount Wolmer as settlors, with the consent of Lady Maud Wolmer, did thereby jointly appoint that from and immediately after the date and execution of the now stating indenture the manor or lordship, and all the freehold and leasehold hereditaments in the principal indenture particularly described and expressed to be thereby respectively conveyed and assigned, save and except the capital messuage or mansion-house and certain other lands and hereditaments mentioned in the schedule thereto, should go and remain unto and to the use of Viscount Wolmer, his heirs and assigns, for his own absolute use and benefit.

The Earl of Selborne died on May 4, 1895.

Under the circumstances aforesaid, succession duty at the rate of 1½ per cent. under 16 & 17 Vict. c. 51, and the Customs and Inland Revenue Act, 1888, and s. 18, sub-s. 1, of the Finance Act, 1894, and temporary estate duty under s. 6 of the Customs and Inland Revenue Act, 1889, were claimed on the death of the Earl of Selborne on the principal value of the Blackmoor estate, and the Commissioners of Inland Revenue required the defendant to deliver an account and particulars as required by the said Acts for the purpose of assessing the duty so payable; but the defendant refused to deliver such account

and particulars, or to account for the duty, and contended that no such duty became payable.

The case was argued in the Divisional Court before Kennedy J. and Phillimore J., when the learned judges differed in opinion, and judgment was given for the Crown. The defendant appealed.

Nov. 22. *Butcher, K.C.*, and *Austen-Cartmell* (*Bridgeman* with them), for the defendant. There was not in this case any succession within the meaning of the Succession Duty Act, 1853, s. 2, and if so no duty is payable under the later Acts. The defendant did not become "beneficially entitled to any property" upon the death of the first Earl. Nothing passed by the settlement upon his death, for the limitations of the settlement became non-existent on the exercise of the power of appointment reserved by the settlement and carried into effect by the deed of appointment. Further, s. 15 of the Act does not apply, for no "title to any succession" has been "accelerated by the surrender or extinction of any prior interests." It is necessary for this purpose to distinguish between acceleration of possession and acceleration of title. Under s. 15 the title—that is the then existing title—must be accelerated to bring the case within the section. It is not sufficient to say that a life interest had been extinguished and the possession of the defendant had been accelerated. The old title was destroyed and not accelerated, and there was no surrender or extinction of any prior interest, for it had come to an end. The power of appointment was an overriding power, and the defendant got a title which was indefeasible, and which he could only get by the exercise of the power. Upon the exercise of the power the estates limited in default of appointment ceased and were defeated: Sugden on Powers, 8th ed. p. 479. On a sale of the estate to a purchaser it would not be necessary to set out in the abstract of title more of the settlement than the joint power, and to shew that it had been exercised, and no conveyancer would, on requisitions on title, ask if succession duty had been paid.

[They cited *Attorney-General* v. *Robertson* (1); *In re Warner's*

(1) [1893] 1 Q. B. 293.

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Settled Estates (1); *Ex parte Sitwell* (2); *Wolverton* v. *Attorney-General* (3); *Attorney-General* v. *Chapman.* (4)]

Sir R. B. Finlay, A.-G., and *Vaughan Hawkins*, for the Crown. Acts such as the Succession Duty Act are to be construed according to the popular and not the technical signification of the words used: *Saltoun* v. *Advocate-General* (5), *Braybrooke* v. *Attorney-General.* (6) If s. 15 is so construed, the defendant's contention will appear to be baseless, for it depends on a mere technicality. It will be admitted that if a settlement of property is made to such uses as two persons shall jointly appoint, and in default to one of them for life, with remainder to the other in fee, if the tenant for life surrenders his life estate to the remainderman succession duty would be payable. The contention is that if substantially the same result is produced by the exercise of the joint power of appointment no duty is payable. Such a contention must be unreasonable. The settlement created a succession which was defeasible, but could not be destroyed by any act of the defendant: *Wolverton* v. *Attorney-General.* (7), where Lord Herschell points out that a succession once created cannot by any act of the successor cease to exist. The power of appointment was not an overriding power, but ancillary to the purpose of the settlement, which was a marriage settlement and part of the consideration for the marriage, and it would be extraordinary if it could be destroyed. The power of appointment was a superadded mode of disposition of the property. The two deeds must be looked at together, and the later one is merely ancillary to the purposes of the earlier one. In substance the succession created by the settlement was accelerated, and the defendant came into possession of the property sooner than he otherwise would have done. The substance of the matter is that there has been a release by one person of his interest in the estate by which the other has come into immediate possession of property in which he had only an interest in

(1) (1881) 17 Ch. D. 711.
(2) (1888) 21 Q. B. D. 466.
(3) [1898] A. C. 535.
(4) [1891] 2 Q. B. 526.
(5) (1860) 3 Macq. 659.
(6) (1861) 9 H. L. C. 150.
(7) [1898] A. C. 535, at p. 548.

remainder. *In re Warner's Settled Estates* (1) has no bearing on the present case.

[They cited also *Charlton* v. *Attorney-General*. (2)]

Butcher, K.C., in reply. The whole argument of the Crown is based on a benevolent interpretation of the statute. Lord Cairns in *Partington* v. *Attorney-General* (3) finally disposed of such an argument when it is attempted to apply it to a taxing statute.

Cur. adv. vult.

Nov. 27. COLLINS M.R. read the following judgment:— This case raises the question whether the present Earl of Selborne is liable to pay succession duty in respect of an estate called the Blackmoor estate, comprised in a deed of October 26, 1883, and afterwards dealt with by another indenture of September 29, 1894, under the circumstances stated in the information. The learned judges in the Court below differed in opinion, Kennedy J. holding, in favour of the Crown, that the duty was payable, Phillimore J. being of the contrary opinion; and Phillimore J. having withdrawn his judgment, the appeal is now brought by the present Lord Selborne.

The question arises in this way. By an indenture dated October 26, 1883, and made in view of the marriage of the now Earl of Selborne, then Viscount Wolmer, with Lady Maud Cecil, the first Earl of Selborne conveyed to trustees an estate called the Blackmoor estate to hold the same on such trusts as the first Earl of Selborne and Viscount Wolmer should jointly appoint, such appointment during the joint lives of Viscount Wolmer and Lady Maud Cecil to be subject to her consent in writing, and in default of or until such appointment to the use of the first Earl of Selborne for life, and after his decease to the use of Viscount Wolmer in fee simple in case he should survive the Earl of Selborne, and if Viscount Wolmer should die in the lifetime of the Earl of Selborne and should leave a son or sons who should have attained or should attain the

(1) 17 Ch. D. 711. (2) (1879) 4 App. Cas. 427.
(3) (1869) L. R. 4 H. L. 100, at p. 122.

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age of twenty-one years, then to the use of the son of Viscount Wolmer who should first or alone attain that age; but if Viscount Wolmer should die in the lifetime of the Earl of Selborne and leave no son who should have attained or should attain the age of twenty-one years, then to the use of the Earl of Selborne in fee simple. By indenture dated September 29, 1894, in exercise of the above power of appointment, the Earl of Selborne and Viscount Wolmer, with the consent of Lady Maud Wolmer, jointly appointed the estate in question (except the capital mansion and certain other lands mentioned in the schedule to the first deed) to Viscount Wolmer in fee.

It is contended for the Crown under these circumstances that the present Earl of Selborne, then Viscount Wolmer, is liable to pay succession duty. The contention is that under s. 2 of the Succession Duty Act, 1853, a succession was created by the settlement of 1883 in Lord Wolmer upon the death of his father, the first Earl of Selborne, and that under s. 15 of the same Act the title to that succession was accelerated "by the surrender or extinction of prior interests" as a result of the exercise of the power of appointment by the deed of 1894. It is incumbent on the Crown, therefore, to shew that the effect of the execution of the power was to accelerate the succession in the manner described by the section, namely, by the surrender or extinction of the prior interest—i.e., the life interest of the first Lord Selborne.

The law as to estates created by the execution of a power is beyond controversy, and is thus stated in Sugden on Powers, 8th ed., at pp. 470, 479. At p. 470: "The estates created by the execution of a power take effect precisely in the same manner (with the exception which will shortly be noticed) as if created by the deed which raised the power. Thus, suppose a general power of appointment to be given to a man by deed, and he by virtue of his power limit the estate to A for life, with remainder to his children in strict settlement, these limitations will take effect as estates limited by the original deed, and in exactly the same way as they would have done had they been limited in that deed by the grantor

of the power, in lieu of the power of appointment by force of which they were created." And at p. 479: "Secondly, as to powers with estates limited in default of their being exercised. Immediately upon the execution of such a power the estates limited in default of appointment cease, and are defeated; and the estates limited under the power take effect from the time of the execution of the power, in the same manner as if they had been contained in the deed creating the power." The effect of the execution of the power, therefore, in 1894 was, in the words just quoted, that the estates limited by the settlement of 1883 in default of appointment "ceased and were defeated, and the estates limited under the power took effect from the time of the execution of the power in the same manner as if they had been contained in the deed creating the power." The execution of the power, therefore, could not have the effect of accelerating the succession created by the settlement of 1883, since its effect was to annul and defeat that succession altogether, and substitute for it the estate created by the execution of the power. Lord Wolmer did not take the fee as upon an acceleration of the estate conferred by the settlement, but by a new title under the appointment. For the same reason there was no acceleration by virtue of the surrender or extinction of any prior interest. The execution of the power, no doubt, extinguished the life interest of the first Lord Selborne under the settlement. But it equally extinguished the succession under that disposition, and the estate given to Lord Wolmer by the execution of the power was not only an estate given by a different title —namely, under the power and not under the settlement in default of appointment, but was also in itself a different interest; for, whereas under the settlement Lord Wolmer took only a fee subject to defeasance on his predeceasing his father and with certain limitations over to his children in that event, he took under the appointment an absolute fee simple. It is clear, therefore, that the Crown failed to bring this case within the words of the Succession Duty Act. It is contended, however, that the words must not be strictly construed, but that a popular and non-technical meaning must be given to

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them, and it is said that there has in substance here been an acceleration of a succession inasmuch as before the execution of the power Lord Wolmer had only a remainder after a life interest, and upon the execution of the power became entitled to the fee. It was argued further that a succession was created by the settlement, and that it was not competent for Lord Wolmer to defeat it, so as to avoid paying duty, by executing the power in favour of himself.

On the question of the rule of construction to be applied to the statute, I think the passage that has been cited from the judgment of Lord Cairns in *Partington* v. *Attorney-General* (1) is important. He there says: "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." Therefore the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted that can only be cured by legislation, and not by an attempt to construe the statute benevolently in favour of the Crown.

As to Lord Wolmer being a party to destroying the succession by an appointment to himself, the learned counsel did not seriously dispute that if the power had been executed in favour of a stranger the succession would have been destroyed and no duty payable (see *In re Warner's Settled Estates* (2), per Jessel M.R.), though they preferred not to admit it in view of certain observations of Lord Herschell

(1) L. R. 4 H. L. 100, at p. 122. (2) 17 Ch. D. 711.

in *Lord Wolverton's Case* (1), nor were they able to point out anything in the wording of the statute which suggested that a different result must follow if the appointment was in favour of one of the appointers. Mr. Vaughan Hawkins indeed contended that the power was not an overriding power, but was really intended to be ancillary to the carrying into effect of the provisions of the settlement, and must, therefore, be construed, as far as I understand him, as bringing into operation at an earlier date the succession of the settlement rather than as substituting for it a new estate created by the execution of the power. But it seems to me that, having regard to the undisputed law as to estates created by the execution of powers, and to the conditions under which succession duty becomes payable by the terms of the 15th section, as upon an acceleration of title to a succession, his argument really amounts to an invitation to us to ignore the legal effect of what was actually done, or to strain the words of the statute to cover something that does not fall within them. With respect to the illustration put by the Attorney-General of an estate limited to such uses as A. and B. should appoint, and in default of appointment to A. for life, remainder to B. in fee, and his contention thereon that it would be absurd to hold that though there would be a succession accelerated if A surrendered his interest to B., yet that there would be no acceleration if they appointed the whole to B. under the power, I can only say that if this result follows logically from the wording of the section it is for the Legislature and not for us to alter it. But, however that may be where the estates that can be created under the power and those limited in default of appointment are coextensive, that is not this case. No dealing with their interest in default of appointment under the settlement of 1883 by Lord Selborne and Lord Wolmer could have effected that which was brought into existence by the appointment under the power, with the consent of Lady Maud Wolmer, and in the case of *Charlton* v. *Attorney-General* (2) Lord Selborne has himself emphasized

(1) *Wolverton* v. *Attorney-General*, [1898] A. C. 535, at p. 548.

(2) 4 App. Cas. 427, at pp. 444, 447.

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this distinction. For these reasons I think this appeal must be allowed.

STIRLING L.J. read the following judgment:—The first matter to be considered in this case is what is the legal effect of the appointment made in 1894 on the limitations contained in the settlement of 1883. As a general rule, there can be no question that the exercise of a power of appointment divests the estates limited in default of appointment and creates new estates: see Farwell on Powers, 2nd ed. p. 276. Accordingly, where the same person took both under the appointment and in default of appointment, it was held by the Court of Appeal in Chancery that the estate of the appointee is a new estate provided it differs in quantum of interest from that conferred by the limitations in default of appointment—*In re Vizard's Trusts* (1)—the difference between the two interests being that under the appointment the appointee took absolutely while in default of appointment he only took contingently.

In *Sweetapple* v. *Horlock* (2) Sir G. Jessel M.R. held, notwithstanding some conflict of authority, that the appointee took a new estate although the interest under the appointment did not differ from that which was conferred on him in default of appointment, and this decision appears to be in strict accordance with principle.

This doctrine applies where the donee of the power is himself a person entitled in default of appointment, subject only to this qualification, that the power must not be exercised so as to defeat or derogate from any pre-existing title created by or derived from the donee, as, for example, the title of a grantee from him or of a trustee in his bankruptcy: see *Alexander* v. *Mills*. (3)

In the present case the estate taken by the present Earl of Selborne under the appointment differs from that which he would have taken in default of appointment in two respects: it is immediate instead of being in remainder, and it is absolute instead of being defeasible. It is not suggested that the Earl

(1) (1866) L. R. 1 Ch. 588. (2) (1879) 11 Ch. D. 745.
(3) (1870) L. R. 6 Ch. 124.

had done any act which precluded him from exercising the power as he did. In point of law, therefore, the Earl took under the appointment a new estate.

Further, the disposition created by the joint operation of the settlement of 1883 and the appointment of 1894 did not confer on the Earl a succession within the meaning of s. 2 of the Succession Duty Act, 1853; for by virtue of that disposition he became beneficially entitled to the property immediately, and not upon the death of any person.

All this was really not disputed on behalf of the Crown; but reliance was placed on s. 15 of the Succession Duty Act, 1853, which, after enactments relating to alienation by the successor (which do not apply here), provides that "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

It was said on behalf of the Earl that this provision does not apply—first, because his title was not accelerated, inasmuch as his title in default of appointment had been divested and destroyed by the appointment and a new title had been conferred on him; and, secondly, because such acceleration, if it existed, did not and could not arise by the surrender and extinction of prior interests, inasmuch as the title of those who would have taken in the event of his death in his father's lifetime had been displaced as well as the life interest of his father.

Here again it was not disputed that in strict law these objections were well founded, but it was said that these were mere technicalities, and that the substance of the transaction ought to be looked at.

To this it was answered that taxing Acts are not to be so dealt with, and the statement of the law by Lord Cairns in *Partington* v. *Attorney-General* (1) was referred to; and in *Tennant* v. *Smith* (2) the present Lord Chancellor said: "In a taxing Act it is impossible, I believe, to assume any intention,

(1) L. R. 4 H. L. 100, at p. 122. (2) [1892] A. C. 150, at p. 154.

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any governing purpose in the Act, to do more than take such tax as the statute imposes." And later: "Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said, in *In re Micklethwait* (1), 'It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words.'"

Much reliance was placed on what was said by Lord Campbell L.C. in *Braybrooke* v. *Attorney-General*. (2) I do not think that the Lord Chancellor meant to lay down anything contrary to the rule just referred to. His Lordship says at the very beginning of his speech: "In this case it is admitted that the appellant, who succeeded to the Audley End estates on the death of his father, since the 16 & 17 Vict. c. 51, the Succession Duty Act, came into operation, is liable in respect thereof to the succession duty"; whereas in the present case that is the very point in dispute. The observations subsequently made by the Lord Chancellor relate to the question which then arose as to who, within the meaning of s. 2, was the "predecessor" of the person admittedly chargeable with duty—a matter as to which there is no controversy in the present case. Reliance was also placed on some observations of Lord Herschell in *Wolverton* v. *Attorney-General* (3), who says: "I am unable to find in the Act any warrant for the view that a succession once created can, by the act of the successor, cease to exist and another succession be substituted for it." The case there being dealt with, however, related to an alienation within the meaning of the enactments contained in the early part of s. 15 of the Succession Duty Act, and I can find nothing to shew that Lord Herschell had in contemplation such a case as the present.

It was also urged that the power of appointment ought to be regarded as a superadded mode of disposition of the property which is subject to the power. There may be cases in which

(1) (1855) 11 Ex. 452, at p. 456. (2) 9 H. L. C. 150, at pp. 165, 170.
(3) [1898] A. C. 535, at p. 548.

such a view may properly be taken, and I have no wish to prejudge them; but the power in this case appears to me to be of a wholly different kind, and to have been intended to enable the donees to create estates which could not possibly be derived from those vested in them in default of appointment.

For these reasons, and also for those given by the Master of the Rolls, with whose judgment I agree, I think that the appeal ought to be allowed.

MATHEW L.J. In this case there are two questions—first, whether there was a succession under s. 2 of the Act; and, secondly, whether that succession was accelerated by an extinction of prior interests under s. 15 of the same statute. We had from Mr. Vaughan Hawkins an extremely dexterous and skilful argument with reference to the two deeds. He insisted that the deed of 1883 created a succession. It would not, if the power conferred by the deed was one that would override the limitations contained in it; and there does not appear to be any question according to ordinary rules that the power would override those limitations. But it was said that we must have regard to the object of the Act; and while it was conceded that if the power had been exercised by Lord Selborne and Viscount Wolmer in favour of a stranger there would be no succession, it was said that it makes all the difference that Viscount Wolmer was donee of the power with his father, Lord Selborne. The utmost strain was put upon the argument of the appellant by this suggestion: Suppose Lord Wolmer had been the sole donee of the power, and the very day after the settlement had been executed, that he had exercised the power in his own favour; it was asked whether he could destroy the succession in that way, and so get rid of the liability to duty. The answer is, Yes. The principle is the same. The estate created under the power is new, and the limitations contained in the deed of 1883 disappear. There was no succession destroyed, because no succession existed. Then it was argued that we ought to look at the two deeds together, and that the deed of 1883 should be treated as a preamble to the deed of 1894, and that,

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treating the latter deed as a consummation of that which was provided by the former deed, it was clear that there was a succession which would make the present Lord Selborne liable to the tax. But that was a question of fact, and it was pointed out that there were no grounds upon which it could reasonably be asserted that the deed of 1894 was a consummation of the deed of 1883. We know nothing about the motives which led to the execution of either deed. What seems clear is that the one was not a consummation of the other, because the deed of 1894 substituted different limitations for those that were contained in the deed of 1883.

Then we were asked to look at the substance of the matter, and to have regard to the facts that had occurred when the deed of 1894 was executed. It was said that it was obvious that there was a life interest in the first Lord Selborne, followed practically by a limitation in fee to the second Lord Selborne, that this estate was accelerated by the extinction of the interest of the first Lord Selborne, and, therefore, in substance, a state of things was created which imposed the duty. It certainly was a most extraordinary argument to address to the Court, and the grounds upon which it rested were observations of Lord Campbell and Lord Herschell in cases which were not in point. We have no power to depart from the language of the Act before us, and, as long as the meaning is plain and there is no repugnancy or inconsistency, we must give effect to the language used. Having regard to the language of the Act, in this case it is clear to my mind that the duty is not imposed; and, therefore, this appeal must be allowed.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Longbourne, Stevens & Powell.*

A. M.

[IN THE COURT OF APPEAL.]

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Nov. 28.

THE ATTORNEY-GENERAL *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF EASTBOURNE.

Revenue—Stamp Duty—Property Purchased under Statutory Power—Production of Instrument of Conveyance—Duty on Transfer of Personal Property—Finance Act, 1895 (58 & 59 *Vict. c.* 16), *s.* 12.

Sect. 12 of the Finance Act, 1895, provides that, where by virtue of any Act any person is authorized to purchase property, he shall, within a specified time, produce to the Commissioners of Inland Revenue an instrument of conveyance of the property duly stamped with the ad valorem duty payable upon a conveyance on sale of the property:—

Held, that s. 12 applies to personal as well as real property; so that, where goods and chattels were included in property purchased under statutory authority, an instrument of conveyance must be produced stamped with the ad valorem duty in respect of the whole of the property so purchased.

Decision of the Divisional Court, [1901] 2 K. B. 773, affirmed.

APPEAL from a decision of a Divisional Court, reported [1901] 2 K. B. 773, on a special case stated by consent in the matter of an information on behalf of the Crown.

The information, which is set out in the report of the case below, was for the recovery of duty claimed under s. 12 of the Finance Act, 1895 (1), in respect of a purchase of property by the defendants under statutory powers.

(1) 58 & 59 Vict. c. 16, s. 12: "Where after the passing of this Act, by virtue of any Act, whether passed before or after this Act, either—

"(*a*) any property is vested by way of sale in any person; or,

"(*b*) any person is authorized to purchase property;

such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the ad valorem duty payable upon a conveyance on sale of the property; and in default of such production, the duty with the interest thereon at the rate of five per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to Her Majesty from such person."

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An agreement was entered into between the Eastbourne Electric Light Company, Limited, and the corporation, which recited that the company, under the Eastbourne Electric Supply Order, 1890, confirmed by the Electric Lighting Order Confirmation (No. 8) Act, 1890, had acquired land and erected lighting works and provided plant, machinery, mains, and other appliances, and had been supplying electrical energy within the area specified in that order.

Clause 1 of the agreement was as follows: "Subject to the provisions hereinafter contained the company will sell and the corporation will buy the whole of the undertaking of the company under the order, and all the powers, rights, and privileges thereby conferred on the company, together with the full benefit of all pending contracts and engagements to which the company are or may be entitled in connection with the said undertaking. Together with the freehold piece of land and the building erected thereon situate in Junction Road, Eastbourne, aforesaid, with all the works, engines, and fixed and movable plant and machinery, wires, cables, pipes, instruments, utensils, tools, and all other goods, chattels, and effects belonging to the company which now are or shall at the time of completion of the purchase be used and provided by the company for the purposes of the undertaking, save and except all depreciation and other reserve funds, cash balances, book and other debts, earnings, rights, and credits belonging or due to the company at the time of such completion, and the company's books and papers and the furniture of their board-room."

By clause 2 it was agreed that the consideration for the purchase should be the sum of 82,135*l.*, in addition to the sums thereinafter mentioned, subject to a deduction on the happening of an event which did not take place.

By clause 4 the company were to carry on the undertaking as a going concern until the day of completion; and by clause 5 the defendants were to pay for all new plant and machinery provided since December 21, 1898, and for certain additional capital outlay which might be incurred by the company before completion. The amount which became payable under this provision was 6614*l.* 2*s.* 9*d.*

Of the two sums of 82,135*l.* and 6614*l.* 2*s.* 9*d.*, together making 88,749*l.* 2*s.* 9*d.*, the consideration for the sale as aforesaid, 37,929*l.* was in respect of goods, wares, and merchandise.

A provisional order was subsequently granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, to the defendants, who for the purposes of the order were to be the undertakers. The provisional order was duly confirmed.

The purchase was duly completed and payment of the purchase-money made. The defendants were willing to produce to the Commissioners of Inland Revenue an instrument of conveyance stamped with ad valorem duty upon the consideration excluding the deduction above mentioned, and excluding the 37,929*l.* in respect of goods, wares, and merchandise.

The Attorney-General contended that the defendants were bound within three months of the completion of the purchase to produce an instrument of conveyance of the whole of the property, including chattels, duly stamped with the ad valorem duty payable upon a conveyance on sale of such property, and that under the circumstances a default has been made within the meaning of s. 12 of the Finance Act, 1895.

The defendants contended that no duty was payable on the sum of 37,929*l.* above mentioned, and that no duty was payable on the deduction above mentioned.

The judgment of the Divisional Court (1) was in favour of the Crown on both points. The defendants appealed, but no question was raised on the appeal as to the deduction.

Danckwerts, *K.C.*, and *Macoun*, for the defendants, in support of the appeal. It is clear that some limitation must be placed on the "property" which is brought within the section. A public authority such as a highway board can only acquire property by reason of statutory powers, and, unless some limitation were placed on s. 12, such a transaction as the purchase of lamp-posts would come within the section, and a stamped conveyance would have to be produced. The reason for this

(1) [1901] 2 Q. B. 773.

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legislation suggests the proper limitation. It was enacted to meet cases like that of railway companies acquiring property, but taking no conveyance: *Great Western Ry. Co.* v. *Inland Revenue Commissioners.* (1) The section was not intended to impose any new taxation, but only to enable the Crown to get hold of duties to which it had been entitled before the passing of the statute. It is only applicable where a conveyance is necessary to pass the property, and was not intended to alter the law as to the passing of chattels, which pass by delivery, and as to which no conveyance is necessary. The mere fact that in this particular case the chattels are included in the conveyance cannot affect the matter so as to make them liable to duty on conveyance. The argument for the Crown imports into the Act a duty which would not otherwise be imposed, contrary to the principles that should govern a taxing Act: *Tennant* v. *Smith.* (2)

Sir Edward Carson, S.-G., and *Rowlatt*, for the Crown. The limitation which should be applied to the Act is that it relates to specific property vested by statute, or which a person is authorized by statute to purchase. This excludes the difficulty suggested by the argument as to the purchase by public bodies of chattels necessary for carrying on their business. The section refers to one sale of property authorized by statute to be purchased. That is clearly the meaning of clause (*a*), and the word "property" has the same meaning in each of the clauses (*a*) and (*b*). From this point of view the real property and the chattels purchased by the corporation come within the section. The only distinction between the two clauses (*a*) and (*b*) is as to the machinery adopted to obtain the duty.

Danckwerts, K.C., in reply.

COLLINS M.R. I am of opinion that this appeal must be dismissed. The case arises in this way. The Eastbourne Corporation acquired power to take by purchase the undertaking of an electric light company which embraced freehold property and chattels, and the value which is put on the chattel part of the undertaking amounts to 37,929*l.* The

(1) [1894] 1 Q. B. 507. (2) [1892] A. C. 150.

revenue authorities claim, under the provisions of s. 12 of the Finance Act, 1895, that the corporation, having acquired a statutory power to purchase, should produce within a given time a conveyance setting out the whole consideration, and with the obligation of having it stamped in respect of the whole of that consideration. The corporation, while willing to produce a conveyance stamped only as regards that part of the property acquired which was subject-matter of conveyance, denied liability to stamp it to any higher extent so as to embrace that part of the property which was composed of chattels.

The case came before the Divisional Court, and my brothers Kennedy and Phillimore gave judgment for the Crown. It has been contended before us, in a very ingenious argument, that that decision is wrong. The broad contention is that the wording of this statute is so wide, inasmuch as it uses the word "property" generally, without any limitation at all, that, taken in its natural interpretation, it would embrace all sorts of transactions which it could not possibly be supposed the Legislature intended to include—for instance, the right of statutory bodies to purchase chattels required from time to time, such as lamp-posts. A number of other instances of the same kind were given, and it was said some limitation on the word "property" as contained in this Act is necessary, and it was asked, Where is that limitation to be put? It was urged that this is an Act, not for imposing taxation, but simply for collecting taxation already imposed elsewhere, and that inasmuch as before the passing of this Act, if a person bought property, partly real and partly personal, he was under no obligation to take a conveyance of any part of that which passed by delivery; so, since the passing of the Act, if he chooses to take a conveyance of chattels, he must pay duty in respect of that consideration; but he is not bound to take a conveyance of chattels if he does not require to do so, and put himself in a worse position than before the passing of the Act. The limitation that should be imposed was said to be one that would leave the parties in exactly the same position as they were in before the passing of the Act so far as the imposition of duties goes.

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I agree that some limitation must be put upon the word "property" in sub-s. (*b*) of this section. But it seems to me that, by reading the whole section together, we can arrive at a limitation arising upon a fair construction of the section. If this results in some additional taxation being imposed, it seems to me that arises from a fair construction of all the parts of the section taken together. Such a case as the present is not that pointed at in the observations of Lord Halsbury in *Tennant* v. *Smith* (1), or in the observations of Lord Cairns in other cases. There is here no attempt to import into an Act something that will impose a duty that is not otherwise imposed by the clear terms of the Act. Here we begin with words large enough to impose the duty, and we are cutting down the words to limit the area of taxation to some natural and fair limit capable of being gathered from the words and their context. Now, what is the governing factor of this legislation? Obviously it is dealing with the case of a purchase of something that I may describe as an "undertaking"—an ascertained subject-matter which is either vested by sale by virtue of an Act of Parliament, or for the acquisition of which by purchase power is taken under an Act of Parliament; and it is with that, it seems to me, that it is dealing in both cases.

In the first case under clause (*a*), where any property is vested in a person by way of sale under an Act of Parliament, whether he likes it or not and whether the property is partly chattels and partly real estate or not, the person in whom the property is vested is compelled to pay the duty as upon the whole consideration. Now, suppose instead of taking the property by virtue of the Act itself he simply acquires power to take it, why should he be relieved of the obligation of paying any part of the duty which he would have had to pay, under this legislation, in respect of the same subject-matter, had he taken it directly by the operation of the Act itself? I agree that it has put a person who takes the right to purchase, in respect of his conveyance, in a somewhat different position from that which he would have been in before; but is it to be supposed that the Legislature had not that definitely in mind,

(1) [1892] A. C. 150.

and that it did not intend (the words are certainly large enough to cover it) in these large transactions of ascertained property that the persons who took the right to purchase should not pay upon it the stamp duty levied on the whole value? It seems to me, taking the two clauses of the section together, that the Legislature was dealing with the same class of property; and when it goes on to speak of an instrument of conveyance of the property in the second case it is dealing with the same subject-matter, which has been treated differently, as a matter of machinery, in the case of vesting under the first case. It seems to me, therefore, on these grounds, that we are not putting any strain upon the words of the section by reading it in the way I have described. In my view the judgment of the Divisional Court was right, and the appeal ought to be dismissed.

STIRLING L.J. I am of the same opinion. It is conceded on both sides that some limitation must be placed on the meaning of the word "property" in clause (*b*) of this section. Two alternative limitations have been proposed. On behalf of the defendants it is proposed to limit "property" to such property as would in the ordinary course of completion of a contract of purchase be the subject of conveyance by deed. On behalf of the Crown it is said that the proper limitation is property specifically defined by the Act of Parliament which is referred to; and we are to determine, as a matter of construction, which of these is the right contention. I have come to the conclusion that the limitation contended for on behalf of the Crown is the proper one, because I think one ought to read the word "property" throughout the section in the same sense. When we look at case (*a*) of the 12th section, we find that there we must attribute to the word "property" the meaning of property specifically defined by the Act referred to. It was not intended in case (*a*) that the "property" should be limited to property which, in the ordinary course of the completion of the purchasing contract, would be the subject of a conveyance; and, as I have said, the same meaning must, in my opinion, be attached to that word in

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case (*b*). For the short reason that I have stated I think the appeal fails.

MATHEW L.J. I am of the same opinion. The argument for the defendants was this—that in construing s. 12, case (*b*), which deals with the case of a person authorized to purchase property, the word "property" is used as meaning landed property. It would be an extraordinary conclusion to come to when we see that the word "property" is used throughout the section apparently in the same sense. It seems to me to be clear that what was intended to be dealt with was specific property vested or acquired under special statutory power. Now, how is that property dealt with? With reference to the case of property vested, there is a provision that a stamp duty shall be imposed on "a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to the vesting," and the duty is "the ad valorem duty payable upon a conveyance on sale of the property." When we come to case (*b*), the instrument of conveyance of the property dealt with is to have the same ad valorem duty stamped upon it. This, as it seems to me, is an indication that both those sub-sections were meant to deal with property of the same description, certainly specific under case (*a*), and equally specific, as it seems to me, under case (*b*). I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for defendants: *Sharpe, Parkers & Co., for H. West Fovargue, Eastbourne.*

A. M.

ATTORNEY-GENERAL *v.* MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF LIVERPOOL.

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Jan. 15.

Revenue—Stamp Duty—Local Authority—Issue of Loan Capital—Date of Issue—Finance Act, 1899 (62 & 63 *Vict. c.* 9), *s.* 8, *sub-ss.* 1, 2.

By s. 8, sub-ss. 1 and 2, of the Finance Act, 1899, where any corporation propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners a statement of the amount proposed to be secured by the issue, charged with an ad valorem stamp duty.

A corporation proposing to issue loan capital by the creation of corporation stock invited tenders on the terms that the stock was to be paid for by the allottees by instalments, the last of which became due on June 21, 1899, after which date the stock was to be inscribed. The stock was applied for and allotted, and prior to June 20, 1899, scrip certificates were delivered to the allottees which entitled the holders, on payment of the remaining instalments, to have stock inscribed in their names.

The Finance Act, 1899, came into force on June 20, 1899.

Held, that there had been an "issue" of the loan capital at the latest by the date when the scrip certificates were delivered, and, that date being prior to the coming into force of the Act, the duty imposed by s. 8 was not payable.

SPECIAL CASE, stated on an information by the Attorney-General to recover duty under s. 8 of the Finance Act, 1899 (1), in respect of the issue of certain loan capital by the defendants.

On April 5, 1899, the corporation of Liverpool, in exercise of the powers contained in certain private Acts, resolved to create stock to be called the Liverpool Corporation 2½ per cent. Redeemable Stock. On April 8, 1899, in pursuance of the resolution, the Bank of England issued a prospectus

(1) The Finance Act, 1899, s. 8, sub-s. 1: "Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners a statement of the amount proposed to be secured by the issue."

Sub-s. 2: "Subject to the provisions of this section every such statement shall be charged with an ad valorem stamp duty of two shillings and sixpence for every hundred pounds and any fraction of a hundred pounds over any multiple of a hundred pounds of the amount proposed to be secured by the issue, and the amount of the duty shall be a debt due to Her Majesty."

Sub-s. 5: "In this section the expression 'loan capital' means any .... corporation stock ...."

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inviting tenders for the stock to an amount of 1,000,000*l.* The prospectus stated that tenders were to be delivered at the Bank of England by April 13; that a deposit of 5 per cent. was to be paid at the time of the tender; and the prospectus contained the following provisions as to the dates on which the further payments on account of the loan would be required: On April 24 so much of the amount tendered for each 100*l.* of stock as when added to the deposit would leave 60*l.* to be paid; on May 24, 30*l.* per cent.; on June 21, 30*l.* per cent. Instalments might be paid in full on or after April 24. In case of default in the payment of any instalment, the deposits and instalments previously paid were liable to forfeiture. Scrip certificates to bearer were to be issued in exchange for the provisional receipts. The prospectus further stated that: "The stock will be inscribed in the bank's books on or after June 21, 1899, but scrip paid in full in anticipation may be inscribed forthwith."

Tenders were received for an amount exceeding the whole of the stock offered, and the full amount of the stock, namely, 1,000,000*l.*, was allotted, notices of allotment being given on April 13, 1899.

The further payments were duly made by the allottees in respect of the greater part of the stock at or about the dates named in the prospectus; but in respect of stock to the amount of 209,400*l.* the final instalments were paid in full prior to June 20, 1899. As and when the sums payable on allotment were paid, provisional receipts were issued to the allottees, and these receipts were exchanged for scrip certificates to bearer.

By the scrip certificates it was certified that the first instalment on the price tendered and accepted for a specified amount of the stock had been paid, and that the holder thereof would, on payment of the remaining instalments, be entitled to have stock to a like amount inscribed in his name. Every one of the allottees received a scrip certificate prior to June 20. The inscription of the stock in the books of the Bank of England was effected between April 19, 1899, and January 25, 1900.

The inscription was effected in the following manner: The holders of scrip certificates delivered them to the bank, the name and address of the holder, with particulars of the amount of the stock held, were inscribed in the books of the bank, and a certificate of inscription was issued to the person whose name was so inscribed. The amount of stock inscribed before June 20, 1899, was 200,300*l.* (part of the above-mentioned 209,400*l.*); on June 20, nil; and after June 20, 799,700*l.*

The Finance Act, 1899, came into operation on June 20, 1899.

The question for the opinion of the Court was whether the said loan capital (other than the said 209,400*l.*) was issued subsequently to the coming into operation of the Finance Act, 1899. If the decision was in the affirmative, judgment was to be entered for the Crown for duty at the rate of 2*s.* 6*d.* for every 100*l.* of the stock issued subsequently to the coming into operation of the Finance Act, 1899.

Rowlatt (*the Attorney-General* (*Sir R. B. Finlay, K.C.*) with him), for the Crown. It is contended that the loan capital, the final instalments on which had not been paid before June 20, 1899, was issued after the Finance Act, 1899, came into operation, and that the duty imposed by s. 8, sub-s. 2, is payable in respect thereof. The question depends upon the meaning of the word "issue" in s. 8. At what period in the process of the creation of loan capital does the issue take place? The word "issue" is not defined in the Act; but there cannot be an issue of loan capital until all the conditions precedent to the creation of the stock have been performed, and nothing further remains to be done except ministerial acts. The payment of the instalments by the allottees must precede the issue, because until the final instalment has been paid, it is uncertain what amount of stock will eventually be created. For example, an allottee might make default in paying the instalments, and, if so, the allotment to him would lapse and no stock would ever come into existence in that case. Therefore, if the loan capital is to be taken to have been issued before the final instalment

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has been paid, it might happen that duty would be paid on a sum considerably in excess of the amount of stock actually created. [He referred to *Bush's Case* (1); *Blyth's Case* (2); *Clarke's Case* (3); *South African Territories* v. *Wallington* (4); *Baring* v. *Inland Revenue Commissioners.* (5)]

Lawson Walton, K.C., and *Gore-Browne*, for the defendants, were not called upon to argue.

PHILLIMORE J. The only question that I have to determine in this case is whether this loan capital was issued after June 20, 1899. It appears that as regards that portion of the loan on which duty is now sought to be charged, namely, 1,000,000*l.* less 209,400*l.*, the final instalments were not paid until June 21, and therefore the inscribing of that stock was not complete until even later than June 21. It is contended on behalf of the Crown that, inasmuch as the final payment was not made until after June 20, this loan capital was issued after the passing of the Finance Act, 1899, which received the Royal assent on June 20. Now, I do not say, for it is not now desirable to do so, when it is that it is the duty of a corporation, endeavouring to raise money by a permanent loan and desiring to conform to the provisions of s. 8 of the Finance Act, 1899, to deliver to the Commissioners the stamped statement which that section requires to be delivered. It may be, and there are analogies which point in that direction, that they must do so before they advertise for tenders, that is, advertise in the usual way which implies an obligation or promise to accept tenders within the terms of the advertisement. I am not sure as to that and I do not so decide; but what I do feel sure of is that the stamped statement must be delivered to the Commissioners before the corporation issue the certificate which is called the scrip certificate. In the present case all the scrip certificates were issued before June 20. That being the case, I conceive that that is the latest date at which there can be said to have been an issue of the loan capital within the meaning of the

(1) (1874) 9 Ch. 554.
(2) (1876) 4 Ch. D. 140.
(3) (1878) 8 Ch. D. 635.
(4) [1898] A. C. 309.
(5) [1898] 1 Q. B. 78.

statute; and if, as I think, the corporation would, if the Finance Act, 1899, had been then in force, have been bound by that date, at the latest, to deliver the statement, they are equally entitled to say, as against the Crown, that unless that date falls after the coming into force of the Finance Act, 1899, they do not come within s. 8. In other words, my opinion is that the whole of the issue of this loan capital, not merely the 209,400*l.*, was made before June 20, 1899, and, therefore, they could not, and were under no obligation to, comply with s. 8, and are not taxable. I do not think that it is necessary to express any further opinion on this point.

The analogy of the tax on companies, when they originally create capital or when their capital is being increased, imposed by the Stamp Act, 1891, and extended by s. 7 of this Act of 1899, would lead one to suppose that the statement required by s. 8 must be delivered to the Commissioners and the duty paid before there is an attempt to obtain from the public the loan capital which the corporation are seeking to raise. But I understand that there may be hardships and difficulties in the way of that construction, and I do not wish to say that that is a necessary construction in this case. All that I do say is that by the time the corporation had issued the necessary certificates whereby they bound themselves, upon the creditor complying with the remainder of the terms of the allotment, to issue the stock to him and to enter him as a stockholder, they had, in my opinion, issued the loan capital.

I, therefore, give judgment for the defendants.

Judgment for the defendants.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitor for defendants: *F. Venn, for Pickmere, Town Clerk, Liverpool.*

F. O. R.

1902
Jan. 15.

ATTORNEY-GENERAL *v.* JOHNSON.

Revenue—Estate Duty—Succession Duty—Gift to a Charitable Society—Reservation of an Annuity to the Donor—Bonâ fide Purchase—Partial Consideration—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 3, *sub-s.* 2—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 7.

In 1889 the directors of an unincorporated charitable society received from B. 500*l.* in lieu of a legacy to the society, and agreed to pay to B. for his life, and to his wife if she survived him, an annuity of 25*l.* The annuity was not charged upon or secured by the property of the society, and was paid by the directors as one of the ordinary outgoings of the society. The commercial value of the annuity was 210*l.* B. and his wife, who survived him, died after the date of the Finance Act, 1894. The Crown claimed that on the death of B. estate duty became payable by the society on the 500*l.* under s. 2, sub-s. 1 (*c*), of the Act; and that on the death of the wife succession duty became payable on the 500*l.* under s. 7 of the Succession Duty Act, 1853:—

Held, that estate duty was payable, but that under s. 3, sub-s. 2, of the Finance Act, 1894, the value of the consideration for the annuity, namely, 210*l.*, must be deducted from the value of the property for the purpose of estate duty, and that the duty was, therefore, only payable on 290*l.*

Held, also, that no succession duty was payable, the transaction being a bonâ fide sale, and, therefore, not within s. 7 of the Succession Duty Act, 1853.

INFORMATION by the Attorney-General claiming estate duty upon the death of Charles Thomas Munday Burton, and succession duty upon the death of Martha Burton, on property in respect of which Charles Thomas Munday Burton had made a disposition in favour of the London Missionary Society. The defendant was the secretary of the society, who for the purpose of ascertaining the liability of the society was, by agreement, to be deemed to represent the society.

The facts as disclosed by the information and by the answer of the defendant were in substance as follows: The London Missionary Society is a body of persons, not incorporated, but associated for certain charitable purposes of a religious character and possessed of considerable invested funds, which are held by trustees appointed by the society, and are dealt with and disposed of by directors in whom the management of the affairs of the society is from time to time vested. In 1889

the society received from Charles Thomas Munday Burton, a director of the society, a sum of 500*l.*, and arranged to pay an annuity of 25*l.* per annum to Burton during his life, and after his death to his wife Martha Burton during her life, if she survived him.

This arrangement was recorded in the following resolution of the directors of the society: "That in consideration of the payment to the London Missionary Society of 500*l.* in lieu of a legacy by a director (Charles Munday Burton, Esq.), who does not wish his name to appear in any published or announced list of subscriptions, the present trustees and their successors in the trusteeship of the society be and hereby are authorized to pay the sum of 25*l.* per annum in quarterly payments (the first payment to be made in months after the receipt of such capital sum) during the life of the said Charles Munday Burton, Esq., and a like payment to his present wife Mrs. Martha Burton during her life, should she survive him."

Previously to the passing of this resolution there had been correspondence between Burton and the society, which is set out in the judgment. The funds of the society were not charged with the payment of the annual sum of 25*l.*, but it was paid by the directors as one of the ordinary outgoings of the society. Burton died on May 12, 1895, and Martha Burton died on May 5, 1900.

The actual commercial value of the annuity of 25*l.*, having regard to the respective ages of Burton and his wife in 1889, was 210*l.*

The information claimed that upon the death of Burton estate duty became payable by the society and its trustees under the Finance Act, 1894, s. 2, sub-s. 1 (*c*), incorporating s. 38, sub-ss. 1 and 2, of the Customs and Inland Revenue Act, 1881, and s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889 (1), on the said sum of 500*l.*, being a gift

(1) By the Finance Act, 1894, s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include. . . ."

"(*c*) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland

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to the society of which bonâ fide possession and enjoyment was not assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise; that upon the death of Mrs. Burton succession duty at the rate of 11½ per cent. became payable by the society and its trustees on the said sum of 500*l.* in respect of the determination of the payment of 25*l.* per annum to Mrs. Burton, under s. 7 of the Succession Duty Act, 1853 (1), and s. 21 of the Customs and Inland Revenue Act, 1888; but it was admitted at the

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Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

By the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2, "The personal or movable property to be included in an account shall be property of the following descriptions, viz.:—

"(*a*) Any property taken as a donatio mortis causâ made by any person dying on or after June 1, 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased."

By the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1, "Sub-s. 2 of s. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—

"The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

(1) By the Succession Duty Act, 1853, s. 7, "Where any disposition of property, not being a bonâ fide sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person, for any term of life or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made."

hearing on behalf of the Crown that the succession duty, if payable, would be at the rate of 10 per cent.

The Solicitor-General (*Sir E. Carson, K.C.*) and *Vaughan Hawkins* (*The Attorney-General* (*Sir R. B. Finlay, K.C.*), with them), for the Crown. The object of these proceedings is to determine the question whether the effect of the decision in *Attorney-General* v. *Grey* (1) is to render estate duty and succession duty payable in the circumstances of this case. The question is whether the payment of the 500*l.* to the society was by way of gift, or, as the defendant contends, was in respect of the purchase by Burton of an annuity. In determining this question the nature of the transaction must be considered, and regard must be had to the relation of the parties, the objects of the society, the absence of any security (the granting of annuities by this society being probably ultra vires and, perhaps, contrary to the provisions of the Life Assurance Companies Act, 1870), the fact that the payment is described as in lieu of a legacy, and the fact that the amount of the annuity is considerably less than could have been purchased for 500*l.* Taking all these matters into consideration, the transaction can only be regarded as a gift with a collateral benefit reserved by contract to the donor. The effect of the agreement to pay the annuity was that bonâ fide possession and enjoyment of the gift was not retained by the donee to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. Estate duty is, therefore, payable under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, incorporating s. 38, sub-ss. 1, 2, of the Act of 1881, and s. 11, sub-s. 1, of the Act of 1889: *Attorney-General* v. *Grey* (1); *Attorney-General* v. *Worrall.* (2) Sect. 3 of the Act of 1894 (3), which will be relied on for the defendant,

(1) [1900] A. C. 124.

(2) [1895] 1 Q. B. 99.

(3) The Finance Act, 1894, s. 3: "(1.) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or

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has no application to the case of a gift. In order to bring a case within either sub-section of s. 3 there must be a bonâ fide purchase.

[PHILLIMORE J. If the transaction were partly a gift and partly a purchase, would it not come within s. 3, sub-s. 2, so as to make estate duty payable only on so much of the 500*l.* as was a gift, namely, 290*l.*?]

The words "any such purchase" in s. 3, sub-s. 2, refer back to the words "bonâ fide purchase" in sub-s. 1. If the transaction, when looked at as a whole, cannot be said to be a bonâ fide purchase within sub-s. 1, then sub-s. 2 has no application, and the duty is payable on the whole sum. If the defendant is in the circumstances of this case entitled under sub-s. 2 to deduct so much of the 500*l.* as represents the value of the consideration for an annuity of 25*l.*, then, on the same ground, in *Attorney-General* v. *Grey* (1), the value of the covenants in favour of the donor ought to have been deducted from the amount of the property on which the duty was payable, but that point was never taken in that case.

The same question, whether the transaction was a gift or a purchase, arises on the claim for succession duty. Unless the transaction was "a bonâ fide sale" by Burton within the meaning of those words in s. 7 of the Succession Duty Act, 1853, which for the reasons already given it was not, then succession duty is payable under that section, there having been a disposition of property accompanied by the reservation of a benefit to the grantor for the life of himself and his wife.

Micklem, K.C. (*Harman* with him), for the defendant. The transaction may either be regarded as a bonâ fide purchase by

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grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

"(2.) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty."

(1) [1900] A. C. 124.

the society on favourable terms of 500*l.*, the consideration being the granting of the annuity, in which case s. 3, sub-s. 1, exempts the society from the payment of estate duty; or the 500*l.* may be treated as split up into two sums, one of 210*l.* representing the sum purchased by the annuity, and the other of 290*l.* being a gift to the society. On neither sum is estate duty payable. The 210*l.* was bonâ fide purchased for full consideration, and is therefore exempt under s. 3, sub-s. 1; and the 290*l.* is exempt because it was a gift made more than twelve months before death, and no part of it was retained for the benefit of the donor, the 210*l.* being ex hypothesi sufficient to meet the payment of the annuity, and, therefore, the 290*l.* does not come within the language of s. 2, sub-s. 1 (*c*), and the incorporated sections. But even if s. 2, sub-s. 1 (*c*), does apply, estate duty is not payable on more than 290*l.*, for 210*l.*, the value of the consideration, must, under s. 3, sub-s. 2, be deducted from the value of the property for the purpose of the duty. With regard to the claim for succession duty, there was no succession by the society to any property on Mrs. Burton's death: *Fryer* v. *Morland.* (1) Sect. 7 of the Succession Duty Act, 1853, only applies to a disposition of property not being a bonâ fide sale. In this case there was a bonâ fide sale of property, namely, 500*l.*, to the society, and none the less so because there may have been less than a full consideration. The meaning of the section is that where there is a gratuitous disposition with a reservation to the grantor, the benefit of which upon his death passes to the grantee, succession duty is payable. But the language of the section is quite inapplicable to the purchase of an annuity accompanied by a gift. In so far as the transaction is a purchase, the Act does not apply; and so far as it is a gratuitous disposition, there is no succession to any benefit on the death of the grantor, for it is an immediate gift. The falling in of an annuity which lies in contract and is not reserved upon any property is not a succession within the Act. If the contention of the Crown is right it would follow that whenever an annuity is purchased for a price which is less than its full commercial value, the nearer the price is to

(1) (1876) 3 Ch. D. 675.

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the full value, the greater would be the amount of succession duty payable; whereas if the price paid for the annuity is its full value, no duty is payable at all. A construction of the Act involving that result must be erroneous.

Vaughan Hawkins, in reply. The words "a bonâ fide sale" in s. 7 mean a sale for full value: *Floyer* v. *Bankes*. (1) The section does not say that there must be a succession, but that the disposition shall be deemed to confer an increase of beneficial interest as a succession. The section is an addition to s. 2, and is intended to cover all kinds of dispositions from which results as from a succession may be obtained.

PHILLIMORE J., after reading the resolution set out above, continued:—Before that resolution was arrived at, two letters had passed from Mr. Burton to the society, which I think it well to read: "March 1. Dear Mr. Jones, — I have not been able to get to the City since last I had the pleasure of seeing you at the mission-house, and as I cannot tell when I may be well enough to venture so far again, will you kindly send on to me for approval the amended document which we arranged should be written out anew"; and on March 7 he wrote: "Permit me to thank you for your very kind letter, which came to hand last night. I can assure you that payment to the society of the anticipated legacy has been made with a glad heart, in which my wife has cordially joined, and the completion of which brings us rest and peace." It appears that this kind of arrangement is not infrequent with this society and with other missionary societies; and I may assume, therefore, that the directors of the society, who enter into the arrangement on behalf of the society, will be careful to see that they get their money's worth; in other words, that the annuity which they give to the subscriber will not be more in commercial value than an annuity purchased in a similar manner from an ordinary office. In this particular case the commercial value of the annuity was 210*l*., and, therefore, if this is to be treated as an ordinary commercial transaction, the society benefited to the extent of 290*l*. The

(1) (1863) 3 D. J. & S. 306.

Crown claims, first of all, estate duty upon this sum of 500*l.*, and, secondly, succession duty. Originally the Crown claimed succession duty at the rate of 11½ per cent.; but the society took the point that, the society being a charity, the duty, if payable at all, would by reason of s. 16 of the Succession Duty Act, 1853, be only 10 per cent.; and the Crown, without exactly admitting that or making it a precedent, is willing that in this case the succession duty shall be assessed on the footing of that contention.

With regard to estate duty, the matter is put in this way. The Finance Act, 1894, s. 2, sub-s. 1 (*c*), renders liable to estate duty "property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." At the present day one must accept the conditions of parliamentary legislation which make this form of drafting imperative, great as is the difficulty which it imposes upon both advocates and judges in construing Acts of Parliament; and the result is that I must read s. 2, sub-s. 1 (*c*), as if the joint sections of the two Customs and Inland Revenue Acts were written out in full in it. The effect of these joint sections so written out is well and, I think, accurately given in Hanson's Death Duties, 4th ed. at pp. 106, 107: "Any property taken as a donatio mortis causâ made by any person dying" (after a particular date) "or taken under a disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made twelve months before the death of the deceased or" (and these are the important words) "property taken under any gift, whenever made, of which bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforth retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." Now, I think it has been suggested on

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behalf of the Crown, but I am not quite certain, that this property is taxable as property taken under "any gift, whenever made, of which bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor." My opinion is adverse to that contention. I do not think that the decision in *Attorney-General* v. *Grey* (1) has any bearing upon this case. It is possible that that case might have been decided in such a way as to affect this case, but I think that the whole question there decided was that property, out of which the donor reserves benefits for his life, is not property which has been assumed and retained to the entire exclusion of the donor; which is, indeed, almost obvious. But as in the present case the property was a sum of 500*l.*, and as it was entirely taken by the society without any reservation at all, and as the annuity which the society contracted to pay was not in any way charged upon this property, nor was there property in any way appropriated to the payment of it, I am clearly of opinion that this part of the section has no application to this case.

There remain, however, the last words of the section—property taken under any gift whenever made, and retained to the entire exclusion of the donor, "or of any benefit to him by contract or otherwise." The words are not very apt; but I think I must take it, particularly after the decision in *Attorney-General* v. *Worrall* (2), that they mean that, where property is given and in consideration of the gift there is a contemporaneous arrangement by contract to make a payment to the donor for life, the gift is not such an out and out gift as to be exempt; and that it falls, therefore, under the section as a taxable gift, and I so assume in deciding this case. If that be so, the case, therefore, stands thus: Under s. 2, sub-s. 1 (*c*), this 500*l.*, being property given, but given upon terms that there should be an annual payment to the donor for his life, is property which would be taxable if the enactment ended with this section. But then comes s. 3, which is a reservation, or taking out of the taxation, of certain property passing under certain forms of

(1) [1900] A. C. 124. (2) [1895] 1 Q. B. 99.

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disposition. I am clear that s. 3 provides for a distinct remission of duty which otherwise would, but for s. 3, have been incurred, and I so construe the section. But there is great difficulty in applying the section, because s. 3, sub-s. 2, is, so to speak, in a different plane of thought or in a different denomination from the sections of the Customs and Inland Revenue Acts, which are to be read into s. 2, sub-s. 1 (*c*), of the Finance Act, 1894; or, to put it in another way, if the sections of the Customs and Inland Revenue Acts had been written out in full in the Finance Act, I cannot conceive that any draftsman would have passed s. 3, sub-s. 2, with those words before him, exactly in the language in which they are passed. More probably, perhaps, the draftsman would have left s. 3 as it stands, and would have amended the section of the Customs and Inland Revenue Act as incorporated into this Act, or so amended it as to make s. 3, sub-s. 2, unnecessary. However, I have to construe the section as it is, and I am clear that I must give some effect to it which will diminish the burden which would otherwise be imposed by s. 2, sub-s. 1 (*c*), and the only way in which I can do that is to say that, where only the Customs and Inland Revenue Act applies, it may be there is no such thing as a purchase for partial consideration. It is evident that there are certain cases, in which there is a purchase for some consideration, which nevertheless is a taxable purchase. That is the effect of the decision in *Attorney-General* v. *Worrall*. (1) There may be cases where there are cross-gifts, and where, though one gift is in consideration of the other, each gift is, for the purposes of taxation, to be treated as gratuitous, and, therefore, whichever comes to be the taxable one is to be taxed accordingly. But under s. 3, sub-s. 2, the case is otherwise, and under that section there may be an arrangement under which property is consciously purchased for considerably less than its value, there being a gift to the purchaser of the balance over the true commercial value of the property. Putting it in other words, there may be, as it were, in the one case cross-claims, and in the other a set-off, and the only amount which is taxable is that which is left after the

(1) [1895] 1 Q. B. 99.

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set-off has been discharged. That is the construction which I place upon the facts of this case. I think that this money is, as I have already said, taxable under s. 2, sub-s. 1 (*c*); but then —and it is important to draw attention to the language of the statute—I am required by s. 3, sub-s. 2, to allow "a deduction from the value of the property for the purpose of estate duty." The whole 500*l.* is in the first instance taxable; then, as much of it as is purchase must be deducted under s. 3, sub-s. 2; and as I come to the conclusion that the value of this annuity was 210*l.*, the result is that that sum must be deducted from the 500*l.*; and, therefore, only 290*l.* remains on which estate duty is payable.

Before passing from this part of the case, I ought to deal with the argument put forward on behalf of the Crown. It was said that it must first be determined whether the transaction, taken as a whole, is a purchase or a gift, and that it is only in the case of a purchase that s. 3, sub-s. 2, has any application. I think that is a mistake, caused by looking solely at the Customs and Inland Revenue Acts, and by not reading the Finance Act and the incorporated sections as one. If the Act of 1894 and the sections of the earlier Acts are read together as one Act, it is to my mind clear that you can have something which is both purchase and gift—pro tanto purchase, and pro tanto gift; and that is, I think, the meaning of s. 3, sub-s. 2. For these reasons there must, in my opinion, be judgment for the Crown on the question of estate duty; but the duty is payable on 290*l.* only.

The question as to succession duty is a more difficult one. The claim is put forward under s. 7 of the Succession Duty Act, 1853. That section is, as has been pointed out, an addition to s. 2, the ordinary taxing section, and it applies to a case such as this unless there has been a bonâ fide sale. It is true that there was no property to succeed to on the death of Mr. Burton and his wife; but the section says that the disposition shall be deemed to confer, at the time appointed for the determination of the benefit, a beneficial increase in the property as a succession. I agree, therefore, that if this transaction was not a bonâ fide sale, and comes within the section,

the Crown is entitled to the duty on the full 500*l.* No question arises here of partition between 290*l.* and 210*l.* But then there arises the very formidable objection, which has been pointed out by counsel for the defendant, that the nearer the annuity comes to a full consideration, the greater the amount of the duty which has to be paid. Now, to my mind, such a result is absurd; and that leads me to consider the question whether the true meaning of the section (I do not decide the question, for a reason which I will presently state) is not this—that where an annuity is purchased, and the purchase is so much greater than the purchase-money that it is not to be deemed to be a bonâ fide sale, then the section applies; in other words, that the section does not apply to a case where a smaller life interest is given than the purchase-money would in fact bring, but only to cases where a large life estate is created really by way of settlement, and it is endeavoured to conceal that settlement by the fact that a small sum of money has been given for the purchase. I am inclined to think that that is the meaning of s. 7, and that the sale is only to be assumed to be not bonâ fide when it is not bonâ fide by reason of the life interest settled being too large. However, I do not decide the case upon that point, because, assuming for the moment in favour of the Crown that this is a case to which the section applies, I have then got to consider what is a bonâ fide sale within the meaning of the section. I do not think that a sale is necessarily not bonâ fide because it is at an under-value, or even at a considerable under-value. I think that where a substantial consideration passes, not only absolutely but relatively substantial, there is an element of bargaining introduced, and the sale is bonâ fide, though in reality very much more is given for the life interest than was in fact required. I think that in the present case, having regard to the expressions in the letter of March 1, and to the fact that this class of arrangement is not uncommon, and to the duty which would be imposed upon the directors of the society (indeed, upon Mr. Burton himself as one of them) to see that the interests of the society were not injured by the arrangement, I must hold that this was a bonâ fide sale within the

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meaning of s. 7. No doubt it is remarkable that the society should enter into such transactions as this. I have not got the constitution of the society before me. I only know that it is a charitable and missionary society. But I very much doubt whether there is any power expressed in the rules of the society enabling the directors to enter into such a transaction; and I very much fear that, if there be no such power, a transaction such as this would be ultra vires; but, while I anticipate that would be the case, I feel certain that it is not to the injury of the society that such an arrangement should be made. I feel certain that the directors would make sure that they were not granting too large an annuity; and to that extent, at any rate, the element of consideration and bargaining would enter into the transaction.

Upon the whole case, therefore, I am of opinion that the Crown is not entitled to succession duty, and is only entitled to estate duty on 290*l*.

Judgment accordingly.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Leonard & Pilditch.*

F. O. R.

THE ATTORNEY-GENERAL *v.* LORD MONTAGU.

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Jan. 14, 15.

Revenue—Estate Duty—Property passing on Death—Principal Value—Mortgage in Fee by Tenant for Life and Remaindermen—Tenant for Life indemnified against Mortgage Debt and Interest—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 *sub-s.* 1 (*b*), 7 *sub-s.* 7.

In May, 1888, the Ditton estate stood limited to the Duchess of Buccleuch for life, and after her death to such uses as Lord Montagu and his eldest son should jointly appoint, and in default of and subject to such appointment to Lord Montagu for life, with remainder to his eldest son for an estate of freehold. By deed of May 29, 1888, the Duchess, Lord Montagu, and his eldest son concurred in granting and appointing the fee by way of mortgage to secure 27,000*l.*, with interest, advanced by the mortgagees to Lord Montagu and his eldest son, who alone covenanted to repay the principal and interest and had power to redeem. By a further deed of the same date Lord Montagu and his eldest son covenanted to indemnify and keep indemnified the Duchess during her lifetime against the mortgage debt and interest, and all claims and demands in respect thereof against her or the Ditton estate, and they conveyed and assigned to trustees, upon trust to effectuate the like indemnity, a yearly sum of 1500*l.*, payable out of other estates in which they had sufficient interest. The Duchess was, and the Ditton estate was, during her lifetime, in fact kept wholly indemnified by them against the mortgage, and all claims and demands for interest or otherwise in respect thereof. She died on March 28, 1895:—

Held, that on her death estate duty was payable by Lord Montagu, under the Finance Act, 1894, upon the principal value of the Ditton estate without deducting the mortgage debt.

INFORMATION by the Attorney-General claiming, on behalf of the Crown, estate duty under the Finance Act, 1894 (57 & 58 Vict. c. 30).

The following facts were stated in the information, and were admitted by the defendant.

By his will, dated August 8, 1883, Walter Francis, Duke of Buccleuch, limited and appointed his Ditton estate, in the counties of Buckingham and Middlesex, to the use of his wife Charlotte Ann, Duchess of Buccleuch, and her assigns for her life without impeachment of waste, and from and after her decease to the use of the testator's second son, the defendant, Lord Montagu, and his assigns during his life without impeachment of waste, and from and after his decease to the use of

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the first, second, third, and all and every other the son and sons of Lord Montagu successively according to priority of birth in tail male, with divers remainders over.

The testator died on April 16, 1884, and his will duly came into operation.

By an indenture, dated May 28, 1888, being a disentailing assurance and resettlement, the defendant, Lord Montagu, and his eldest son, J. W. E. D. Scott Montagu, who had attained the age of twenty-one, with the consent of the Dowager Duchess of Buccleuch as protector of the settlement created by her deceased husband's will, conveyed to certain trustees the Ditton estate to hold the same unto the trustees in fee simple subject to the life estate of the Dowager Duchess and all powers annexed or appurtenant to that life estate, but freed from the life estate of Lord Montagu under the will and all powers annexed to or exercisable during the continuance of that life estate, and also freed from the estate in tail male of J. W. E. D. Scott Montagu under the will and from all other his estates in tail male or in tail (if any), and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail or any of them to such uses and in such manner as Lord Montagu and J. W. E. D. Scott Montagu should from time to time by deed jointly appoint, and in default of and subject to any such appointment to the use of Lord Montagu for his life without impeachment of waste in restoration of the life estate given to him by the said will and the powers annexed to such life estate, with remainder to such uses as J. W. E. D. Scott Montagu, after the death of Lord Montagu, should from time to time by deed or by will appoint, and in default of and subject to any such appointment to the use of J. W. E. D. Scott Montagu for his life without impeachment of waste, with remainder to the use of his first and other sons in tail male, with remainders over.

By an indenture of mortgage, dated May 29, 1888, it was witnessed that in consideration of 27,000*l.* lent to Lord Montagu and J. W. E. D. Scott Montagu at the request of the Dowager Duchess of Buccleuch by three mortgagees, of which

sum Lord Montagu and J. W. E. D. Scott Montagu thereby acknowledged the receipt, Lord Montagu and J. W. E. D. Scott Montagu jointly and severally covenanted with the mortgagees to pay to them on November 29 then next the sum of 27,000*l.*, with interest thereon in the meantime at the rate of 4*l.* per cent. per annum, and also, so long as any principal should remain due on the security of the mortgage deed, to pay the mortgagees interest thereon at the same rate by equal half-yearly payments as therein mentioned; and it was also witnessed that for the consideration aforesaid the Dowager Duchess of Buccleuch, as tenant for life in possession under the will of her deceased husband, granted, and Lord Montagu and J. W. E. D. Scott Montagu, in exercise of the joint power of appointment given to them over the fee simple in remainder expectant on the decease of the Dowager Duchess by the indenture of disentail and resettlement dated May 28, 1888, appointed the Ditton estate (being a mansion-house, park, messuages, lands, and hereditaments), to hold unto and to the use of the mortgagees in fee simple subject to a proviso for redemption (and for reconveyance of the estate to the uses which under the will and resettlement should be then subsisting), on payment by Lord Montagu and J. W. E. D. Scott Montagu, or one of them, or the persons deriving title under them, of the principal sum and interest. And the Dowager Duchess of Buccleuch, in respect of her life interest only, and Lord Montagu and J. W. E. D. Scott Montagu, thereby severally covenanted with the mortgagees to keep the mansion-house, messuages, and buildings in tenantable repair, and insured from damage by fire.

By an indenture of even date with the last-mentioned indenture, after reciting (inter alia) that the Dowager Duchess of Buccleuch agreed at the request of Lord Montagu and J. W. E. D. Scott Montagu to concur in the mortgage of the Ditton estate upon the express condition that she should be indemnified in respect thereof in manner thereinafter appearing, it was witnessed that in pursuance of the said agreement and in consideration of the premises Lord Montagu and J. W. E. D. Scott Montagu did jointly and each of them as a separate

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covenant did for himself covenant that they, or one of them, their or one of their heirs, executors, and administrators, would at all times thereafter keep indemnified the Dowager Duchess of Buccleuch against the mortgage debt of 27,000*l.* and interest, and against all actions, suits, proceedings, claims, and demands which might be brought or made by any person or persons against her or the Ditton estate during her life by way of enforcing the mortgage security, or for or in respect of the said sum of 27,000*l.* and interest thereby secured. And in further pursuance of the said agreement, and for the consideration aforesaid, Lord Montagu and J. W. E. D. Scott Montagu assigned and conveyed to the trustees an annuity or yearly sum of 1500*l.* (being part of an annuity payable out of the Clitheroe estate under the will of Walter Francis, Duke of Buccleuch, during the continuance of a term of 1300 years from the testator's death to the possessor for the time being of the Beaulieu estate, which by settlement stood limited to Lord Montagu for life, with remainder to J. W. E. D. Scott Montagu in tail male, with remainders over), to hold the same annuity or yearly sum of 1500*l.* unto the trustees, their executors and administrators, during the joint lives of the Dowager Duchess of Buccleuch, Lord Montagu, and J. W. E. D. Scott Montagu, and during the joint lives of the Dowager Duchess of Buccleuch and the survivor of Lord Montagu and J. W. E. D. Scott Montagu, if the term of 1300 years should so long continue undetermined, nevertheless, upon the trusts thereinafter declared concerning the same, and Lord Montagu and J. W. E. D. Scott Montagu, in exercise of a joint power of appointment vested in them over the Clitheroe estate, appointed that that estate should, subject to certain charges and incumbrances thereon and to the said term of 1300 years, go, remain, and be to the use that the trustees, their heirs and assigns, might receive thereout the yearly rent-charge of 1500*l.*, to commence from the determination of the said term of 1300 years, if the Dowager Duchess of Buccleuch should be then living, and to continue thenceforth during her life, and to be considered as accruing from day to day, but to be paid without any deduction by equal quarterly payments on the

usual quarter-days, nevertheless upon the trusts thereinafter declared concerning the same. And it was declared that the trustees or trustee should hold the annuity of 1500*l.* thereinbefore assigned and the rent-charge of 1500*l.* thereinbefore appointed (as the case might be) upon trust thereout during the life of the Dowager Duchess of Buccleuch to keep down the interest on the mortgage debt of 27,000*l.*, or on so much thereof as should from time to time be owing on the security of the said indenture of mortgage, to the intent that the life interest of the Dowager Duchess of Buccleuch in the Ditton estate might be wholly exonerated therefrom, and to repay to her all sums which she might from time to time be compelled to pay, and all costs and expenses which she might incur by reason of the said mortgage security, or in respect of the money secured thereby, and also to repay and make good to her all rents and profits of the Ditton estate which, but for the said mortgage security, would have been paid or payable to her, and which she might lose by reason of the said mortgage security, or of any proceedings taken by the mortgagees to enforce the same, and to pay to her compensation in respect of any messuage or messuages, lands or hereditaments forming part of the Ditton estate of which she might be deprived of the possession by reason of the mortgage security, and generally at all times thereafter to save harmless and keep indemnified the Dowager Duchess of Buccleuch from and against the said mortgage debt of 27,000*l.* and the interest thereon, and from and against all actions, suits, proceedings, claims, and demands which might be brought by any person or persons against her or the Ditton estate during her life by way of enforcing the said mortgage security, or for or in respect of the said sum of 27,000*l.* and interest thereby secured.

The Dowager Duchess of Buccleuch died on March 28, 1895.

The mortgage of May 29, 1888, was created wholly for the benefit of the defendant, Lord Montagu, and his son, J. W. E. D. Scott Montagu, or one of them, and the Dowager Duchess of Buccleuch and her estate was in fact kept wholly indemnified by them, or one of them, against the mortgage and all claims for interest or otherwise in respect thereof.

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The information further alleged: "The defendant as tenant for life in possession of the Ditton estate is bound to deliver an account and to pay estate duty under the Finance Act, 1894, on the principal value thereof; but in delivering such account he claims to deduct the mortgage for 27,000*l.* from the capital value of the estate, and refuses to pay estate duty on the capital value without such deduction. The informant submits that such deduction ought not to be allowed."

The information prayed that it might be declared that upon the death of the Dowager Duchess of Buccleuch estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the Ditton estate devised by the will of Walter Francis, Duke of Buccleuch, as property which passed on her death within the meaning of that Act without deduction of the mortgage debt of 27,000*l.* created by the indenture of mortgage of May 29, 1888, and that the defendant was bound to deliver an account and pay duty accordingly.

Sir Robert Finlay, A.-G. (*Sir Edward Carson, S.-G.*, and *Vaughan Hawkins* with him), for the Crown. On the death of the Dowager Duchess of Buccleuch estate duty became payable by the defendant on the principal value of the Ditton estate without deducting the mortgage debt of 27,000*l.* The defendant before he came into possession, and his son, had the benefit of the sum advanced on mortgage. The late Duchess in fact enjoyed her life estate freed from any claim for principal or interest, and the reality of the transaction, which is shewn by the disentailing assurance and resettlement of May 28, 1888, the mortgage deed of May 29, 1888, and the deed of indemnity of the same date, must be looked at, the effect being that she was fully secured and indemnified against any liability in respect of the mortgage. This case differs entirely from *Earl Cowley* v. *Inland Revenue Commissioners* (1), which will be relied on for the defendant. There a father and son, tenant for life and tenant in tail respectively, executed a disentailing deed by which they granted the estates to a trustee freed from the estate tail to such uses as they should jointly appoint. Then

(1) [1899] A. C. 198.

they mortgaged the estates in fee to a company as security for a loan, part of which was advanced for the benefit of the father and part for the benefit of the son. Incumbrances on the father's life estate were paid off with part of the loan. Then father and son executed a deed of resettlement charging the estates with an annuity to the son payable during the father's life, and subject thereto the estates were declared to be held in trust for the father for life and after his death to the son for life, with remainders over. The House of Lords held that the case fell within s. 1 of the Finance Act, 1894; that the settled property which passed to the son on the father's death was only the equity of redemption, and estate duty was therefore only payable on the equity of redemption. Many passages in the judgments delivered in the House of Lords indicate clearly that their Lordships considered what the real nature of the transaction was in that case. Here that which passed on the death of the late Duchess was the whole value of the property without any deduction in respect of the mortgage. The Crown is entitled to estate duty under s. 1 of the Finance Act, 1894, which imposes the duty "upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of" a person dying after the commencement of the Act, and also under s. 2, sub-s. 1, which provides: "Property passing on the death of the deceased shall be deemed to include. . . . (*b*) property in which the deceased or any other person had an interest on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." Sect. 7 gives the mode in which the value of an estate for the purpose of estate duty is to be determined, and sub-s. 7 is material here. It provides: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall —(*a*) if the interest extended to the whole income of the property, be the principal value of that property." As between the deceased and the successors, the interest of the deceased, having regard to the deed of indemnity, did extend to the whole income of the property.

Danckwerts, K.C., and *Austen-Cartmell*, for the defendant.

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The property which passed to the defendant on the death of the Dowager Duchess was the equity of redemption, and that only, and it is upon the value of that property only that estate duty is payable. All the parties competent to convey the fee concurred in granting it to the mortgagees. The effect was to take the fee simple of the Ditton estate out of the settlement of May 28, 1888, and to leave in its place only the equity of redemption: see *Attorney-General* v. *Beech* (1) and *Attorney-General* v. *De Préville*. (2) Estate duty is payable only upon what is left. The present case is governed by the decision of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners*. (3) The destination of the money advanced on mortgage, and the fact that the Dowager Duchess received no benefit out of it, is immaterial; the only material question is, What was the property which "passed," within the meaning of s. 1, on the death? In *Earl Cowley* v. *Inland Revenue Commissioners* (4) Lord Macnaghten said that if the property fell within s. 1 it could not also come within sub-s. 2; the two sections were mutually exclusive.

The deed of indemnity does not affect the question of liability to estate duty. It does not in any way affect the validity of the release of the Duchess' life estate. The mortgagees were not parties to it; it is collateral, and does not affect the Ditton estate in any way; the mortgagees could enforce their rights by sale, under the power given by the Conveyancing Act or otherwise, against that estate without reference to it. The true effect of the whole transaction was that the consent of the Dowager Duchess to give up her life estate to the mortgagees was purchased by the defendant and his son for money or money's worth. It is not necessary, on the present information, to deal with the question whether, under the Act of 1894, the annuity, or the rent-charge, granted by the deed of indemnity could be made the subject of estate duty.

[They also referred to *Attorney-General* v. *Hawkins*. (5)]

Sir Robert Finlay, *A.-G.*, in reply. Lord Macnaghten's

(1) [1899] A. C. 53.
(2) [1900] 1 Q. B. 223.
(3) [1899] A. C. 198.
(4) [1899] A. C. 198, at p. 212.
(5) [1901] 1 K. B. 285.

judgment in *Inland Revenue Commissioners* v. *Priestley* (1) shews that he has seen reason to qualify his dicta in *Earl Cowley* v. *Inland Revenue Commissioners* (2) with respect to the two sections—1 and 2—of the Finance Act, 1894, being mutually exclusive: see also Channell J.'s judgment in *Attorney-General* v. *Dobree*. (3) It is doubtful whether the decision of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners* (2) applies at all where the settlement is made before the mortgage; but it is not necessary, having regard to the deed of indemnity, to decide that question in the present case.

PHILLIMORE J. On May 28, 1888, the Ditton estate stood limited to the Dowager Duchess of Buccleuch for her life, and then, subject to an overriding power of appointment, to Lord Montagu for life, with remainder to his eldest son for some estate of freehold. On May 29, 1888, by an indenture to which the Duchess, Lord Montagu, and his son were parties as grantors, by conveyance of the Duchess' life estate, and by an appointment made by Lord Montagu and his son in exercise of the power which I have mentioned, the estate was mortgaged to secure a sum of 27,000*l.* and interest. The ordinary personal covenants for payment by the mortgagor or mortgagors were expressly made by Lord Montagu and his son only, and the power of redemption was given, not to the Duchess, but to Lord Montagu, who had a life estate in remainder, and his son, and the persons deriving title under them. In other respects there is no peculiarity—and I am not certain that the last is a peculiarity—in the mortgage deed. By an indenture of even date Lord Montagu and his son covenanted personally to keep the Duchess indemnified in respect of the mortgage debt and interest, and to indemnify her if she should suffer loss in respect of the Ditton estate; and they conveyed to trustees by way of further securing the Duchess certain sufficient interests which they had in other properties during her lifetime. In these circumstances the Duchess was never the sufferer during her life by the fact that she had joined in the

(1) [1901] A. C. 208, at p. 213. (2) [1899] A. C. 198.
(3) [1900] 1 Q. B. 442, at pp. 450, 451.

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mortgage, and had incumbered, as between herself and the mortgagees, her life estate in the Ditton estate, and she died, as she had lived, beneficially interested in the Ditton estate to its full value. Upon her death the Crown claimed estate duty from Lord Montagu, and he admitted his liability to estate duty. The question then arose as to the measure of that liability. The Crown said it was to be assessed on the supposition that the Duchess had been beneficially interested during her life and until her death in the Ditton estate to its full value. Lord Montagu said that she was to be treated as only interested in the Ditton estate incumbered by the mortgage for 27,000*l.*; and that is the matter which I have to determine.

The Crown rests its claim upon s. 1, s. 2, sub-s. 1 (*b*), and s. 7, sub-s. 7, of the Finance Act, 1894, and those seem to me, in substance, the only material portions of the Finance Act which I have to consider.

The argument of the defendants rests upon the deductions which they say are to be drawn from the decision of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners*. (1) They also pray in aid the decision of the House of Lords in *Attorney-General* v. *Beech* (2), and the decision of the Court of Appeal in *Attorney-General* v. *De Préville*. (3)

I may say that there will never be found any reluctance in me to carry those three decisions to their full conclusion. I may refer to what I said in *Attorney-General* v. *Hawkins* (4) as to my willing acceptance of the decision of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners* (1), and I may now say with all respect that I have not the slightest intellectual difficulty in following and, I hope, applying any one of those three decisions—*Attorney-General* v. *Beech* (2), *Earl Cowley* v. *Inland Revenue Commissioners* (1), and *Attorney-General* v. *De Préville* (3)—whenever they become material to the decision of a case which comes before me. For the purposes of this case I accept the contention of the defendant's counsel that the Duchess' estate was legally incumbered,

(1) [1899] A. C. 198.
(2) [1899] A. C. 53.
(3) [1900] 1 Q. B. 223.
(4) [1901] 1 K. B. 285, at p. 295.

and that the legal incumbrance must be taken into consideration in assessing what her successors have to pay. But, having said that, I nevertheless come to a conclusion in favour of the Crown. I have, in my opinion, simply to consider what was the beneficial interest in the Ditton estate which the Duchess enjoyed and upon her death relinquished; and, having to consider that, I have no hesitation in saying that she must be deemed to have been beneficially interested in the Ditton estate to its full value. I am not certain that it makes really any difference that the defendant and his son happen to be also the people who are bound to keep the Duchess' interest in the Ditton estate up to its full value. If it does make any difference, it makes the case for the Crown stronger. I think, however, it would have been quite the same if it had been other persons who had covenanted to indemnify and secure the Duchess; provided always, that the security was ample and sufficient. Looking, as I think I ought to do, at the mortgage deed and the deed of indemnity as constituting, so far as the Duchess and Lord Montagu and his son were concerned, one transaction, I come to the conclusion that, though the Ditton estate in respect both of the Duchess' interest and the interest in remainder was a primary security, or *the* security, of the mortgagees, nevertheless, as between those interested in the Ditton estate, the Duchess' interest in that estate was only liable by way of suretyship, and Lord Montagu and his son were bound to prevent the Duchess ever suffering any diminution of her interest. If it had been necessary during the Duchess' lifetime to estimate, inter vivos, the value of her life interest in that property—if, for instance, a tax had been imposed upon capital instead of upon income, or if the Duchess had conveyed her estate and there had been a question of the ad valorem duty to be imposed upon that conveyance, it is possible, or probable, that the possible liability of the Duchess' estate to meet the mortgage debt would have had to be assessed as a contingent liability; and the assessment of that contingent liability at some figure would, pro tanto, have diminished the value of her life interest. If (which might have happened) the Duchess had been called upon to pay the

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mortgage, or if the mortgagees had entered into possession, or if they had sold, or compelled the Duchess to join in selling, some portion of the property to meet their claims, then the estate which the Duchess relinquished on her death would have been pro tanto diminished, and a lesser rate of duty would have been recoverable from Lord Montagu and his successors. But now that I have to consider what is the duty payable upon the Duchess' death, I know that there can now be no liability, and I know that there has been no demand and no payment in respect of her liability, and therefore I think that I am bound to treat the Duchess as, no doubt, having subjected her estate to a legal incumbrance, but having that incumbrance in fact as a mere shell without any kernel, and as in fact being beneficially interested in the Ditton estate to its full value up to the date of her death. Taking this view, it becomes unnecessary to consider many other matters which have been raised and met during the course of the argument of this case. Accepting to the full the canons which binding authorities have imposed upon me, and applying my mind to the construction of the Act, thinking that this case comes simply within the plain language of s. 1, though it may also come under s. 2, sub-s. 1 (*b*), I am of opinion that the estate which the Duchess relinquished, or the interest in it which passed on her death, was the full beneficial life interest in the Ditton estate, and that the duty must be paid without any deduction in respect of the incumbrance of 27,000*l*.

I give judgment, therefore, for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendant: *Nicholl, Manisty & Co.*

W. A.

[IN THE COURT OF APPEAL.]

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THE BRITISH ELECTRIC TRACTION COMPANY *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—Lease—Tramways—Repair of Road—Payment by Lessees in lieu of Repair—Purchase of Electrical Energy from Lessors—"Lease"—"Bond or Covenant"—"Covenant relating to the Matter of the Lease"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 4; *s.* 77, *sub-s.* 2, *and Schedule, Title "Bond."*

By a lease of tramways to a traction company by a municipal corporation, made pursuant to the Tramways Act, 1870, the company were to pay rent at a fixed rate per cent. on the cost of the original purchase. They were also to pay to the lessors a given sum per mile of road along which the tramways were laid, in lieu of repairing any portion of such road, and maintaining the tramways, except the rails and electrical bonds laid thereon. The minimum amount payable under this clause was 900*l.* per annum, and a power of distress was reserved in respect of it. They were also bound to purchase from the vendors all electrical energy required for the purpose of the tramways, and to pay for the same at a given rate, the minimum sum payable in any one year being 4000*l.* On a case stated:—

Held, that the 900*l.* payable in respect of the repair of the road was rent, and that ad valorem duty was payable upon it under s. 4 of the Stamp Act, 1891:

Held, also, that the 4000*l.* payable in respect of the supply of electrical energy was not rent, but that it was payable under a covenant made in further consideration for the lease, and relating to the matter of the lease, within s. 77, sub-s. 2, of the Stamp Act, 1891, and that the instrument was not chargeable with ad valorem duty in respect of it.

APPEAL from the judgment of a Divisional Court on a case stated by Commissioners of Inland Revenue.

1. On January 24, 1900, an instrument was presented on behalf of the appellants to the Commissioners of Inland Revenue for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

2. The instrument was an indenture dated January 23, 1900, and made between the corporation of Croydon of the one part and the appellants of the other part. It contained a recital that the corporation were empowered by the Tramways Act, 1870, with the consent of the Board of Trade and subject to

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the provisions of the Act, to demise the right of user of the tramways referred to in the indenture and the right of demanding and taking tolls in respect of the same. By clause 1 the corporation granted and demised unto the appellants the right of user of the tramways, together with the right of demanding and taking tolls and charges in respect of the same, excepting and reserving the right of the public to pass along or across every or any part of any road or street along or across which any of the tramways or any part thereof is laid, whether on or off the tramway, with carriages not having flange wheels or wheels suitable only to run on the road of the tramway. And also excepting and reserving unto the corporation full power and authority to exercise all powers vested in them in relation to the tramways or the streets or roads on which they were laid, or the gas and water pipes or the sewers and drains and electric light cables in or under such streets or roads. By clause 2 the rights were granted to the appellants for the term of twenty-one years from January 1, 1900, for their exclusive use, subject to a power reserved to the corporation to determine such term in certain events. Clause 3 provided for the amount of rent payable, which amount depended in part on the cost of purchase, reconstruction, electrical equipment, rolling stock, agreed extensions, and other works, and part of which amount was ascertainable at the date of the indenture and amounted to 3250*l.* per annum. By clause 4 there was a further provision that the appellants should pay as from the date of a certificate of the Board of Trade authorizing electric traction the sum of 100*l.* per annum per mile of road along which the tramways are laid in lieu of maintaining roads and repairing tramways, except the rails and electrical bonds laid thereon, which sum amounted altogether to 900*l.* per annum. By clause 5 a further uncertain sum was reserved as rent in certain contingencies. Clause 6 provided for the determination of the lease at the option of the corporation, the option being exercisable at the end of a period of five years from the commencement of the term in certain contingencies, and thereafter at the end of any subsequent period of five years. By clause 9 "the lessees will from the commencement of electric traction

pay to the corporation during the said term of twenty-one years the clear yearly rent of 6½ per cent. on the cost of the purchase and reconstruction, and electrical equipment, rolling stock, agreed extensions, and other works carried out and expenditure incurred by the corporation in connection therewith, including parliamentary costs and deposits, and consulting engineers' fees, but not including the generating station or generating plant, and the said annual sum of 100*l.* per mile hereinbefore reserved at the times and in manner aforesaid, and such further rents as may become payable under clause 5." Clause 27 provided that the appellants should purchase all electrical energy required for the purpose of the tramways from the corporation. Clause 30 provided that the appellants should, as from the date of the certificate of the Board of Trade authorizing electric traction, pay the corporation at the rate of 2*d.* per Board of Trade unit for the supply of electrical energy supplied by the corporation during the continuance of the lease, with a provision that so long as the corporation duly supplied the energy reasonably required by the appellants for working the tramways the minimum sum which should be payable in any one year should be 4000*l.* Clause 33 provided that the corporation should repair and maintain the roads on which the tramways were placed. Clause 42 provided for the determination by the appellants in certain contingencies of their obligation to purchase electrical energy from the corporation. Clause 44 gave a special power of distress in respect of "the said rents or other payments whatsoever (except the payments to be made for or in respect of electrical energy)."

3. The indenture of lease was expressed to be made in pursuance of the Tramways Act, 1870.

4. The appellants contended that the instrument fell to be charged under the head "Lease or Tack" in the 1st schedule to the Stamp Act, 1891, under the following sub-heading, namely: "Of any other kind whatsoever not hereinbefore described, 10*s.*"

5. The Commissioners were of opinion that in respect of the provisions other than those contained in clauses 5 and 30 the

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instrument was chargeable with ad valorem duty either under under sub-head (3.) of the above-mentioned head, or, if not, then with the larger duty prescribed under the head "Bond, Covenant, &c.," in the same schedule, and on the whole they assessed it under the former head, namely, at the rate of 5*s.* for every 50*l.* on the rent of 3250*l.* plus 900*l.*, together 4150*l.*, namely, the sum of 20*l.* 15*s.* They also held that it was chargeable with the fixed duty of 10*s.* in respect of the rent mentioned in clause 5, which was at the date of the indenture unascertainable, and in respect of the minimum sum of 4000*l.* per annum mentioned in clause 30 was further assessable under the head "Bond, Covenant, &c.," No. 1, in the same schedule, with 105*l.*, being 2*s.* 6*d.* per cent. on the minimum sum multiplied by 21, the number of years during which the same might have been payable if the tramways had been electrically equipped and the certificate of the Board of Trade obtained on January 1, 1900, and if the corporation had made no default in the supply of electrical energy during the continuance of the lease.

6. The appellants, being dissatisfied with the assessment, required the Commissioners to state and sign a case.

The questions for the opinion of the Court were :—

(1.) Whether the instrument was chargeable with the several sums of 20*l.* 15*s.*, 10*s.*, and 105*l.*

(2.) If not, with what duty the instrument was chargeable.

The judges before whom the case came in the Divisional Court differed in opinion. Kennedy J. was of opinion that the sums of 900*l.* and 4000*l.* were not chargeable either as rent or as bringing the instrument within the heading "Bond, Covenant, &c." Phillimore J. was of opinion that both sums were rent; but the learned judge withdrew his judgment, and judgment was given for the appellants.

The respondents appealed.

Nov. 22. *Sir R. B. Finlay, A.-G.*, and *Rowlatt*, for the Crown. Under s. 4 of the Stamp Act, 1891, instruments such as this, relating to distinct matters or made for different considerations, are to be charged as if there were separate instruments in each

respect. (1) It is submitted that the 900*l.* under clause 4 should be charged as rent, and the 4000*l.* under the heading "Bond, Covenant, or Instrument" in the schedule. As to the 900*l.*, it is an annual payment by the company in lieu of their undertaking to repair the roads. It is mentioned in clause 9 as reserved, and if what is called the rent had included this amount, in consideration of the corporation keeping the roads in order, there could be no question that it would be chargeable, and there is no substantial difference between the two cases. The instrument cannot be brought within s. 77, sub-s. 2. (2) That sub-section refers to the improvement of property, and not to a question whether the landlord or the tenant shall repair.

As to the 4000*l.*, it comes within the description of "Bond, Covenant, or Instrument" in the schedule to the Act as being the "security for sums of money at stated periods" in the same way that the payment made in *National Telephone Co.* v. *Inland Revenue Commissioners* (3) came within that description. *Jones* v. *Inland Revenue Commissioners* (4), to the like effect, was approved in the last-mentioned case. If the payment cannot be brought within the heading "Bond, Covenant, or Instrument" in the schedule, then it should be treated as rent. Sect. 77, sub-s. 2, of the Stamp Act, 1891, does not exempt this payment. This is clear when the history of the enactment is looked at. *Re Bolton's Lease* (5) decided that

(1) 54 & 55 Vict. c. 39, s. 4: "Except where express provision is made by this or any other Act, (*a*) an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters; (*b*) an instrument made for any consideration in respect whereof it is chargeable with ad valorem duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations."

(2) 54 & 55 Vict. c. 39, s. 77, sub-s. 2: "A lease made for any consideration in respect whereof it is chargeable with ad valorem duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration."

(3) [1899] 1 Q. B. 250.

(4) [1895] 1 Q. B. 484.

(5) (1870) L. R. 5 Ex. 82.

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a covenant in a lease to complete houses was "further or other valuable consideration," and chargeable with duty beyond the ad valorem duty. In the same year the statute 33 & 34 Vict. c. 44 was passed to deal with that decision, and the statute of 1891 is in nearly the same terms. The sole object was to get rid of the effect of the decision which dealt with improvements of the property leased, and neither statute has any application to the case of additional pecuniary consideration.

Pickford, K.C., and *A. Llewelyn Davies*, for the Traction Company. The facts of this case do not bring it within *Jones* v. *Inland Revenue Commissioners* (1) or *National Telephone Co.* v. *Inland Revenue Commissioners*. (2) The question in this case is whether it is brought within s. 77, sub-s. 2. In *Re Bolton's Lease* (3) the covenant to complete the houses was regarded as liable to duty as if it were in a separate instrument. That is what is being asked for in this case by the Crown; but the subsequent legislation shews that cannot now be done. As to the 900*l.*, there is a statutory obligation on tramway promoters to repair the highway between certain limits. That obligation of the corporation would fall on the lessees, and, as that was inconvenient, the lessees agreed to pay 900*l.* a year to the corporation to do the work which would otherwise have fallen on the lessees. This is not a consideration for the lease or for the occupation of the tramways, but a contract which relieved the lessees of the obligation to repair, and which they might have made with any one, as, for instance, a named contractor. In paragraph 44, and throughout the lease, a distinction is drawn between rents and other payments to be made by the lessees, and this particular payment comes within the latter description. As to the 4000*l.*, the same considerations apply with greater force. The payment is to be for the supply of electrical energy, and stands on the same footing as the supply of beer to a tied house or the supply of any other goods.

Sir R. B. Finlay, A.-G., in reply.

Cur. adv. vult.

(1) [1895] 1 Q. B. 484. (2) [1899] 1 Q. B. 250.
(3) L. R. 5 Ex. 82.

Nov. 26. COLLINS M.R. read the following judgment:—

The question in this case is what stamp duty is payable under a certain instrument executed between the corporation of Croydon and the British Electric Traction Company, Limited. The learned judges in the Court below differed in opinion. Kennedy J. decided against the Crown, while Phillimore J. decided, in the main at all events, in favour of the Crown. The latter learned judge withdrew his judgment, and the Crown now appeals.

The instrument in question purports to be a lease from the corporation to the Traction Company. By clauses 1, 2, and 3 it was witnessed that, in consideration of the yearly rent and other payments thereinafter reserved, and of the covenants, conditions, and agreements thereinafter contained, the corporation did thereby grant and demise unto the lessees the right of user, for the purpose of conveying passengers, &c., of the tramways delineated and described in the plan annexed thereto for a term of twenty-one years, yielding and paying yearly the clear rent or sum of 6½ per cent. on the cost of purchase, &c., on January 1, April 1, July 1, and October 1 in every year. The amount of the rent payable under this clause has been agreed at 3250*l.*, and the lease has been stamped with an ad valorem stamp based upon that figure. The dispute between the parties arises upon two other provisions. First, under clause 4 of the agreement, which provides as follows: "The lessees shall in addition, as from the date of the certificate of the Board of Trade authorizing the use of the demised tramways for electric traction, pay to the corporation by equal quarterly payments as aforesaid the sum of 100*l.* per annum per mile of road along which the tramways are laid, in lieu of repairing any portion of any such road and maintaining the tramways, except the rails and electrical bonds laid thereon. Provided always that the amount payable by the lessees under this provision shall not be less than 900*l.* per annum." As to this, the Crown contend that further ad valorem stamp duty is payable as upon rent of 900*l.* per annum.

The other point arises under clauses 27 and 30 of the agreement. Clause 27 is as follows: "During the continuance of this

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lease the lessees shall purchase all electrical energy required for the purposes of the tramways demised by this lease from the corporation, and shall not, without the consent of the corporation (save as hereinafter provided), purchase electrical energy from any other person, or generate or manufacture electrical energy for the purposes hereof." By clause 30 "The lessees shall, as from the date of the commencement of electrical traction, pay the corporation for the supply of electrical energy supplied by the corporation during the continuance of this lease at the rate of 2*d.* per Board of Trade unit for each unit supplied. The lessees shall, so long as the corporation duly supply the energy reasonably required by the lessees for working the demised tramways, pay the corporation 4000*l.* per annum as a minimum sum whether sufficient units at 2*d.* per unit are taken to produce that sum during any one year or not." Then follow provisions as to default of supply by the corporation, quarterly accounts, quarterly payments, and the power of the corporation to discontinue the supply in case of default in punctual payment. Clause 42 provides for the determination of the lease by the lessees as to the supply of electrical energy in the event of the corporation failing to carry out the terms as to the supply of current, and for reference to arbitration on notice by the corporation. Clause 44 provides "That in case the said rents or other moneys whatsoever (except the payments to be made for or in respect of electrical energy) hereby made payable, or any part thereof at any time or times during the said term hereby granted, fail to be paid at the times and in manner herein provided for that purpose, and notice of such non-payment shall have been given to the lessees," the corporation may enter and distrain for the rents and payments so in arrear.

It is contended by the Crown that the contract of clause 30 for the payment of 4000*l.* per annum is subject to stamp duty as a "bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for

any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack": Schedule to the Stamp Act, 1891. Failing that, they contend that it is rent, and subject to further ad valorem stamp duty as such. The Traction Company contend that, in accordance with the judgment of Kennedy J., they are excused from any further duty in respect of either the covenant for the payment of 900*l.* per annum under clause 4, or of 4000*l.* per annum under clause 30, by the provisions of s. 77, sub-s. 2, of the Stamp Act, 1891. That sub-section is as follows: "A lease made for any consideration in respect whereof it is chargeable with ad valorem duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration." They say that the effect of this sub-section is to create an exception in favour of a lease chargeable with ad valorem duty, as this is an exception to the provisions of s. 4 of the Stamp Act, which is as follows: "Except where express provision to the contrary is made by this or any other Act, (*a*) an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters; (*b*) an instrument made for any consideration in respect whereof it is chargeable with ad valorem duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations." On the other hand, the Crown contend, as I have already said, that as to 900*l.*, under clause 4, it is to be treated as rent and as such swelling the ad valorem stamp duty. As to the 4000*l.*, their primary contention is that, though in the lease, it relates to a distinct matter and is to be charged as if it was a separate instrument under s. 4, and that, inasmuch as if it had stood alone in a separate instrument it would have been subject to stamp duty as a "bond, covenant, or instrument, being the only security" for sums of money

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at stated periods, so equally it is now stampable as such, notwithstanding the fact that it is contained in the lease. The alternative contention, which was very faintly pressed, is, as I have already said, that the 4000*l.* may be treated as rent. First, then, with respect to the claim in respect of 900*l.*, under clause 4, at first sight, having regard to the form of the words used, it looks to me as if it were assumed that a liability had already been imposed on the lessees to repair the road and maintain the tramways, and that the effect of the provision is to commute that liability for a money payment to the corporation to take upon themselves the duty of repairing instead of leaving the lessees to do it, and if this were the true view of the position I should be disposed to agree with Kennedy J. that it falls within the provision of s. 77, sub-s. 2, exempting a lease chargeable with ad valorem duty from paying a duty in respect of the further consideration arising upon that covenant. It is a fact, however, that by the General Tramways Act the liability for these repairs is imposed on the corporation itself—a liability from which it cannot escape by demising the tramways—while there are certainly no express provisions in the lease throwing the obligation of repairing upon the lessees. Construing the clause, therefore, in view of this fact, it seems to me in substance to be what the Attorney-General contended it was—namely, a stipulation for additional rent payable to the lessors by reason of their undertaking to keep the demised premises in repair; and it is to be noted that under clause 44 this sum, as well as the rent of 3250*l.* above mentioned, is made recoverable by distress. Therefore, I accept the contention of the Crown on this part of the case.

As to the 4000*l.*, which is under clause 30 the minimum sum payable by the lessees for the supply of electric energy by the corporation, I do not think that this sum can be properly described as rent. It is not in fact rent: it is a sum payable for electric energy to be supplied just as gas, or water, or any other commodity might be supplied, and the parties themselves do not pretend to treat it as rent, and have expressly excepted it from the provision as to distress in clause 44. On the other hand, I do not think it can be treated as a distinct matter

falling outside the exception of s. 77, sub-s. 2, which relieves "any covenant relating to the matter of the lease" from "any duty in respect of such further consideration." It is one of the covenants in the lease, and it seems to me to relate to the matter of the lease, within the meaning of that section. If there were an express covenant to draw the supply of electric energy from the corporation for the purpose of using it on the tramway, I think it would be a covenant touching and concerning the thing demised within the strict rules applicable to covenants running with the land, just as much as a covenant to take all the beer to be consumed on the premises of a particular public-house from the lessor: see *Clegg* v. *Hands*. (1) The covenant to pay 4000*l*. as a minimum sum is really ancillary to the main provision and a security for its performance, and even though technically such a covenant might not be capable of running with the land, I think the words of the section, "any covenant relating to the matter of the lease," ought to receive a wider interpretation. I think the object of the Legislature was to relieve from charge all covenants fairly within the scope of the lease and being part of the consideration for the lease, and I think the covenant in question fairly comes within the exemption which the Legislature intended to bestow. This reasoning, if correct, disposes equally of the alternative view of Phillimore J., which was not pressed by the Crown, that the consideration is "money, stock, or security."

For these reasons I think the contention of the Crown fails as to the 4000*l*., either as grounding a claim for stamp duty as a bond or covenant, or as being rent. The result is that the Crown succeeds as to the claim for stamp duty on the 900*l*., but fails as to the claim for stamp duty on the 4000*l*.

STIRLING L.J. I entirely agree with what has been said by the Master of the Rolls upon both points; but, as we are differing to some extent from both the learned judges who constituted the Divisional Court, I wish to add a few remarks on my own behalf.

It was admitted that if either of the sums of 900*l*. or 4000*l*.

(1) (1890) 44 Ch. D. 503.

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which are mentioned in this lease can be treated as rent, then an ad valorem stamp duty is exigible by the Crown. The first inquiry, therefore, is whether either of them can be so treated, and this in my view depends simply upon the true construction of the instrument, which is a lease of a somewhat unusual subject-matter, namely, the use of certain tramways granted under the statutory powers of the Tramways Act, 1870, s. 19.

As regards the 900*l.*, I think it is a rent; and really the only objection which arises to its being so treated is that, in point of fact, it is not expressly so denominated in the lease; but I observe in the first place that the first mention of it occurs in clause 4 between clauses 3 and 5, which deal with two other sums, both of them described as rent. It is found in the place where reservations in the lease are found. When we come to the covenant on the part of the lessees in clause 9 this sum is described as reserved, and therefore as a reservation; and, lastly, there is found in clause 44 a power of distress in respect of it. I think the true meaning of the instrument was this—that the corporation, who are the lessors, finding that the rent reserved eo nomine by clause 3 was inadequate if they were called on to discharge their statutory duty of repairing the road along which the tramways are laid, reserved to themselves an additional minimum rent of 900*l.* a year in order to provide for that. The same object might doubtless have been attained in other ways, but it seems to me that the counsel for the Crown here bring the parties within the strict letter of the law, and consequently that ad valorem duty is chargeable.

As regards the 4000*l.*, it seems to me to stand on an entirely different footing: it does not occur among the reservations; it is not described as reserved; there is no power of distress in respect of it; on the contrary, it is expressly excepted from the power of distress; and I think, therefore, that the sum of 4000*l.* is not rent: I think it is a payment under one of a series of covenants relating to the supply of electric energy for the purpose of working the tramway.

That then brings me to consider whether the argument on behalf of the Crown is well founded—that a separate duty is chargeable under s. 4 of the Act. Now, I think upon this

point that the history of the legislation is material. By the Stamp Act, 1854, there was an ad valorem duty charged, and also a further duty in respect of any further or other valuable consideration for the lease. It was decided by the Court of Exchequer—*Re Bolton's Lease* (1)—that "a lease made in consideration of a rent, and also of a covenant to complete houses, is a lease made for a further or other valuable consideration" within the meaning of the Stamp Act, and was, therefore, chargeable with the further stamp duty imposed. That decision was no sooner given than the Legislature passed an Act (33 & 34 Vict. c. 44) for the purpose of overruling it, and it was there provided that "no lease already made or hereafter to be made for any consideration or considerations in respect whereof it is chargeable with ad valorem stamp duty, and in further consideration either of a covenant by the lessee to make or of his having previously made any substantial improvement of or addition to the property demised to him, or of any usual covenant, shall be deemed to be or to have been chargeable with any stamp duty in respect of such further consideration." That was passed in 1870. In the very same year a general Stamp Duty Act was passed, and that contains—s. 8—a clause similar to what is found in s. 4 of the present Act; and in that also is found a clause—s. 98, sub-s. 2—which is in terms identical with that which is found in the Stamp Act, 1891, which now governs the subject. There it is to be observed that the covenants which are not to create any liability to additional duty are described as including "any covenant relating to the matter of the lease," which is an enlargement of the words found in the prior Act, which include "any usual covenant" only. I think it is quite clear from a consideration of these successive Acts that the intention of the Legislature was to confer on lessees—persons taking under lessors—immunity from this additional stamp duty in respect of any covenants which fairly relate to the matter of the lease.

Now, the covenant in question is one which relates to the supply of electrical energy for the purpose of working the

(1) L. R. 5 Ex. 82.

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tramways. The lessors were a public body—a corporation who had been entrusted by the Legislature with the duty of making and dealing with this tramway. They saw fit in the exercise of their statutory powers to demise it to a company to work it, and that was done in the interest of the public. At the same time it appears that the lessors were themselves persons who supplied electric energy which might under the circumstances become available for the working of the tramway. It was in the interest of the public that, if this was found to be a successful mode of working tramways, it should be applied to the tramway in question; and, looking at these facts, I think the covenants relating to this matter fairly relate to the matters of the lease.

There is only this further observation to be made. Sect. 4 consists of two sub-clauses, (*a*) and (*b*), but they are both subject to this: that except where other express provision to the contrary is made in the Act they are to have operation. As regards sub-cl. (*b*), upon the construction which I give to the words which are found in s. 77, sub-s. 2, there is a clear exception from the operation of sub-cl. (*b*), and I think that upon the true construction of sub-cl. (*a*) there is also an express exception. It is said that s. 77, sub-s. 2, only extends to the stamp duties which are exigible on the instrument considered as a lease, and that the clause does not exempt the instrument in question from the proper duty under the head of "Bond, Covenant, or other Instrument." That depends upon whether, in the language of s. 4, sub-cl. (*a*), we find several distinct matters in the instrument; and, looking again at the history of the legislation on the subject, and finding the object of it to be to enable lessors and lessees to contract by way of covenant in the lease with relation to all subjects which relate to the matter of lease, without being subject to any duty except the ad valorem duty, it seems to me that, upon the fair and true construction of s. 4, sub-cl. (*a*), we ought to hold that where the lease contains a contract of that nature it is not to be treated as a distinct matter within the meaning of that sub-section. I therefore agree with the result which the Master of the Rolls has arrived at.

MATHEW L.J. I agree with the judgments that have been pronounced by the Master of the Rolls and Stirling L.J.

If one sum had been reserved in respect of the demise of the tramways and the supply of electric energy, I should be of opinion that it was rent, and might be the subject of distress as rent. The principle applicable to such cases is stated very clearly by Willes J. in *Selby* v. *Greaves* (1), where the question was whether there was a right to distrain on part of a factory which had been let with an obligation to supply steam power, and a lump sum had been reserved, the decision was that there might be a distress upon the factory for the entire rent. This is the passage in the judgment: "The conclusion I arrive at is that the letting was not a mere letting of an onstand for the lace-machines, but a letting of a defined portion of the room separated from the remaining portion, with exclusive possession by the person taking it, and that possession was taken under that demise. If that be so, the supply of steam power and gas would be merely ancillary, and a rent reserved for the whole would be construed as issuing out of the fixed property, as in the case of furnished apartments, and there would in like manner be a power to distrain, though the use of movable property formed part of the consideration for the rent." This is entirely applicable to this case; and if, as I have said, a lump sum had been reserved here, there would have been no doubt that it might be treated as rent. But that is what is not done by this lease The two sums that have been referred to by the Master of the Rolls, the 3250*l.* and the 900*l.*, appear to be rent; but when we come to the 4000*l.*, which is payable in respect of the supply of electric energy, the obligation is collateral and ancillary to the demise of the fixed property, and, therefore, stands clear of the character of rent.

The Attorney-General argued that if the payment is not rent then the document is subject to stamp duty under the heading "Bond or Covenant," and the payment must be taken into account in ascertaining what the stamp should be.

(1) (1868) L. R. 3 C. P. 594.

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BRITISH ELECTRIC TRACTION COMPANY v. INLAND REVENUE COMMISSIONERS.

Mathew L.J.

That contention, as it appears to me, amounted to an attempt to revive the authority of *Re Bolton's Lease*. (1) In that case the Court of Exchequer held that an obligation by a builder to build additional houses, or to complete houses sounded in "Bond or Covenant," and, therefore, should be taken into account in ascertaining the stamp. That opinion of the Court of Exchequer was corrected by the Legislature directly after the decision was given. I am of opinion that the superadded obligation under this lease is analogous to that added to the lease in *Re Bolton's Lease*. (1) Again, the case of the tied house, where the tenant is bound to take all the beer from the lessor, is closely analogous to this case. Such cases appear to me to be distinctly provided for by the language of s. 77, sub-s. 2, which controls s. 4 of the Act, and shews that the payment to be made in respect of the supply of electric energy is not to be included in ascertaining the stamp duty. I concur in the judgment of my learned brothers.

Appeal allowed in part.

Solicitor for appellants: *Sydney Morse.*
Solicitor for respondents: *The Solicitor of Inland Revenue.*

(1) L. R. 5 Ex. 82.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1901
Dec. 20.

In re E. A. B.

Bankruptcy—Receiving Order—Debtor—Scheme of Arrangement—Creditor—Withdrawal of Debt—Release—Security—Undue Preference—Knowledge of Debtor—Composition—"Debts provable"—Approval of Scheme—Conduct of Debtor—Official Receiver's Report—Misconduct—"Rash and hazardous Speculation"—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-ss.* 7, 8, 9, 10.

Where a scheme of arrangement is submitted by a debtor under s. 3 of the Bankruptcy Act, 1890, and part of the arrangement is that certain creditors withdraw their debts, the Court will not refuse its sanction to the scheme merely on the ground that the withdrawals are on terms giving those creditors an advantage over the other creditors, provided that the withdrawals have not been obtained by the debtor himself, or by any person with the knowledge and on behalf of the debtor.

Thus, a scheme of arrangement submitted by a debtor against whom a receiving order had been made secured payment to the unsecured creditors, except two who had withdrawn their debts, of a sum of not less than 7*s.* 6*d.* in the pound, as required by s. 3, sub-s. 9, of the Act. The withdrawals had been obtained by the debtor's brother, who had, but without any knowledge whatever on the part of the debtor himself, given them a security placing them, it was said, in a better position than the other creditors under the scheme:—

Held, that, as the security given to the two withdrawing creditors was, neither in form nor in substance, the result of any bargain made by or with the knowledge of the debtor himself, it was not a ground for the Court refusing to sanction the scheme.

The expression "debts provable" in s. 3, sub-s. 9, of the Bankruptcy Act, 1890—which requires that a scheme of arrangement shall, as a condition for its approval by the Court, provide reasonable security for payment of not less than 7*s.* 6*d.* in the pound "on all the unsecured debts provable against the debtor's estate"—means "debts provable," not at the date of the receiving order, but at the time when the scheme comes before the Court for approval, and, therefore, does not include debts which may have previously been withdrawn or released.

Misconduct on the part of a debtor, to be sufficient to justify the Court in refusing its sanction to a scheme under s. 3, sub-s. 9, must be of a gross character, or such as would make the sanction contrary to public policy. The mere fact that the official receiver has found in his report made under sub-s. 7 that the debtor has contributed to his failure by "rash and hazardous speculation" is not by itself a sufficient ground for refusal.

On May 21, 1901, a receiving order was made against E. A. B., a debtor, upon a creditor's petition.

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The debtor's unsecured liabilities at that date amounted to nearly 70,000*l.*, while his assets, which consisted only of his interest in certain foreign concessions, were of doubtful value, though estimated by him to produce 27,500*l.*

The adjourned first meeting of creditors was held on July 30, 1901, at which a proposal for a scheme of arrangement was accepted by the creditors, but, upon its being submitted to the Court on September 17, 1901, the Court refused to approve it as not being calculated to benefit the general body of creditors. An amended scheme was then prepared, and, at a further meeting of creditors held by the leave of the Court on October 10, 1901, a resolution was passed accepting it.

The amended scheme was of a somewhat elaborate character, but its main object was to provide, as required by s. 3, sub-s. 9, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), reasonable security for the payment of not less than 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtor's estate; and it was based upon the withdrawal by certain large creditors of their claims against the estate. These claimants were four in number, representing a total sum of 53,067*l.*, of which the debtor's brother claimed 42,662*l.*, the executors of one W. 1722*l.*, and the executors of one F. 2783*l.*, the remaining claimant being one for 5900*l.*, representing a debt paid for the debtor to a life assurance society. The brother already held two assignments executed by the debtor to him in 1898 and 1899, and by which the debtor had for valuable consideration assigned his interest in the foreign concessions to his brother to secure repayment of a sum of 12,000*l.* These securities the brother proposed to give up to the executors of W. and the executors of F.

It appeared that as far back as 1896 the debtor had assigned in general terms the whole of his property, both present and future, to his brother, to whom he was at the time heavily indebted; and, in order to facilitate the carrying out of the scheme, the brother agreed to make over all such property as was covered by the assignment for distribution under the scheme among the general body of creditors, with the exception of the interest in the foreign concessions vested in him by the

assignments of 1898 and 1899, and which, as above stated, he intended to reserve for the two withdrawing creditors—W.'s executors and F.'s executors.

On November 9, 1901, the official receiver, as required by s. 3, sub-s. 7, of the Bankruptcy Act, 1890, made his report to the Court upon the amended scheme, and thereby, after stating the details of the scheme, he reported that absolute and unconditional withdrawals under seal of the four claims above mentioned had been produced to him: that the withdrawal by the debtor's brother was entirely voluntary, and that the withdrawals of the W. and F. claims had been procured by promises of pecuniary benefit to those creditors from a source outside the debtor's estate, the terms being, it was believed, agreed between the debtor's solicitor and those creditors with the general knowledge and approval of the debtor: that in accordance with the terms of the above compromises the brother had executed a declaration of trust in favour of the two latter creditors, W.'s executors and F.'s executors, of his interest under the two deeds of 1898 and 1899.

The official receiver further reported that the debtor's insolvency had arisen from his having unsuccessfully started and carried on a weekly penny newspaper, and having embarked in Stock Exchange speculations, and having borrowed money at heavy rates of interest; and that he had contributed to his failure "by rash and hazardous speculations." The official receiver also reported that the amended scheme was calculated to benefit the participating creditors, whose claims however formed but a small proportion of all the unsecured debts provable at the date of the receiving order, and that it provided reasonable security for payment of 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtor's estate other than those that had been withdrawn.

The amended scheme was approved by all the unsecured creditors, except two, whose claims were of comparatively small amount, the admitted debt of S., one of these two creditors, being 180*l.* only.

It appeared that exception was taken by certain creditors to the declaration of trust executed by the debtor's brother in

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favour of W.'s executors and F.'s executors, two of the withdrawing creditors, whereupon those two creditors at once offered, if required by the Court, to give up all benefits under that declaration of trust.

The amended scheme came before the registrar for approval on November 15, 1901, S., the creditor for 180*l.*, being the only creditor then actively opposing it. The question was raised whether the arrangement with W.'s executors and F.'s executors for the withdrawal of their claims upon receiving the declaration of trust in their favour by the debtor's brother had been made with the knowledge and approval of the debtor himself; and for the purpose of clearing up this point the debtor's public examination, which had been closed, was ordered to be reopened, which was done. The debtor was thereupon asked this question: "Had you been any party to the terms being given to them (the two creditors in question)?" To which the debtor replied, "No; I had had nothing to do with it." Upon this evidence the registrar was satisfied that the debtor had no knowledge of the matter; and after hearing the arguments of counsel for and against the proposed scheme he made an order that—the Court being satisfied that the terms of the scheme of arrangement were reasonable and calculated to benefit the general body of creditors, and that the case was not one in which the Court would be required, if the debtor were adjudged bankrupt, to refuse an order of discharge; and being satisfied that facts had been proved which would justify the Court in refusing, qualifying, or suspending an order of discharge, but having regard to the nature of such facts, and the scheme of arrangement providing reasonable security for payment of not less than 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtor's estate—the said scheme of arrangement be thereby approved, and the receiving order of May 21, 1901, discharged.

S., the opposing creditor, then moved by way of appeal to have the registrar's order set aside.

The appeal was heard on December 20, 1901.

Macaskie, K.C., and *Thorn Drury*, for the appellant. In the

first place, this scheme, which is proposed under s. 3 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), is not reasonable, and not calculated to benefit the general body of creditors. An undue advantage has been given to the two creditors who withdrew or released their debts upon receiving a declaration of trust in their favour which would have the effect of giving them something in excess of the composition under the scheme. The Court cannot sanction a scheme under such circumstances.

Secondly, having regard to the conduct of the debtor, this is not a scheme which the Court will, in the exercise of its discretion, approve. Sub-s. 9 of s. 3 is as follows: "If any facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate." Sub-ss. 7, 8, 9, and 10 all shew that the Court has a very wide discretion as to allowing or disallowing a scheme of arrangement proposed by a debtor: the interests of the public have to be considered, and protection must be given to the majority of the unsecured creditors.

[VAUGHAN WILLIAMS L.J. Is not the general result of the authorities this—that if the creditors have approved the scheme, the Court, when the scheme comes up for approval, will not go behind it unless it is so contrary to public policy that the Court cannot accept it? Primâ facie, it is the creditors who are really intended to deal with these matters, and it is not easy to go behind their discretion.]

It is not necessary that the objection should be directed to the scheme itself. One of the matters to be taken into consideration by the Court is the conduct of the debtor as reported by the official receiver under sub-s. 7. The appellant does not impute dishonourable conduct on the part of the debtor here, but the Court will, in the exercise of its discretion as to whether it should approve the scheme, have regard to the general conduct of the debtor and to the question whether the bankruptcy has been brought about by such conduct as rash and hazardous

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speculation: *In re Barlow, Ex parte Thornber* (1); *In re Burr, Ex parte Board of Trade* (2); and here the official receiver has reported as a fact that the debtor had contributed to his failure "by rash and hazardous speculations." In the public interest it is a serious matter that, when a receiving order has been made, the debtor should be able, before the reasons for his insolvency have been thoroughly investigated, to have his bankruptcy proceedings annulled by a scheme of arrangement like this. It is clear that, so far back as 1896, the debtor assigned to his brother all his present and future property; and this was followed by the assignments to his brother in 1898 and 1899, so that by 1899 he had stripped himself of everything. Now, it is open to the Court to inquire, under s. 29 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), whether such a voluntary settlement was justifiable or not: the appellant does not suggest that it was intended "to defeat or delay creditors"; but if it was "unjustifiable" that would be a ground for refusing to approve this scheme. It is also submitted that some of the claims require investigation, in order that it may be ascertained whether the amounts are really due or not.

Thirdly, upon the construction of the language of sub-s. 9 of s. 3 of the Act of 1890, the scheme does not provide the security required. The security required by the sub-section is for the payment of not less than 7*s.* 6*d.* in the pound "on all the unsecured debts provable against the debtor's estate." Those words must be read literally, and refer to the unsecured debts provable at the date of the receiving order, and not merely to the debts existing at the time the scheme comes before the Court for approval. And there is good reason for taking the date of the receiving order as the time for ascertaining what debts are "provable" for the purpose of the composition under the scheme. The policy of Parliament, as shewn by the two Acts of 1883 and 1890, is to discourage failures by persons possessing no assets and going on incurring liabilities when hopelessly insolvent. The words of the section are clear, and mean what they say. Sect. 37, sub-s. 3, of

(1) (1886) 3 Mor. 304.

(2) [1892] 2 Q. B. 467.

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the Act of 1883, and the definition section, s. 168, shew that the words "debts provable in bankruptcy" mean debts "to which the debtor is subject at the date of the receiving order." For the purpose of construction the two Acts are to be read as one: Bankruptcy Act, 1890, s. 31. The result is that sub-s. 9 of s. 3 of the Act of 1890 is punitive, and that if the scheme proposed by the debtor does not secure at least 7*s.* 6*d.* in the pound upon all unsecured debts provable at the date of the receiving order, the debtor must be adjudged bankrupt. The case of *In re Burr* (1) leaves the construction of sub-s. 9 open. *In re Lord Thurlow* (2) may perhaps be cited on the other side as a decision of the Court of Appeal sanctioning the system of withdrawals under a scheme of arrangement; but the point was not in fact there decided at all. It is, however, a decision that, under s. 20, sub-s. 1, of the Act of 1883, if no composition or scheme is accepted or approved, the Court shall adjudge the debtor bankrupt.

To force this scheme on unwilling creditors is an abuse of sub-s. 9 of s. 3 of the Act of 1890. Their assent to the scheme was given in ignorance of the terms upon which the withdrawals had been obtained.

Reed, K.C., and *Muir Mackenzie*, for the debtor,

The Solicitor-General (*Sir E. Carson, K.C.*) and *Sutton*, for the official receiver, and

G. F. Hart, for creditors opposing the appeal, were not called upon.

VAUGHAN WILLIAMS L.J. On this appeal a good many points have been mentioned by Mr. Macaskie, but there are really only two which require to be dealt with. The first, and indeed, to my mind, the only serious, point which has been suggested is this: that this scheme ought not to be approved because of the declaration of trust which was given to the two creditors, W.'s executors and F.'s executors, who withdrew their claims—that is, released their debts; and it is said that the effect of giving the declaration of trust to these two creditors on their withdrawing their claims was to place them

(1) [1892] 2 Q. B. 467, 476. (2) [1895] 1 Q. B. 724.

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in a better position than the other creditors, because, as it was suggested, the realizable value of the property affected by these two declarations of trust would give each of the two creditors something more than 7*s.* 6*d.* in the pound. It is said that for that reason we ought not to allow this scheme to be sanctioned. Now, I will at once say that if, upon the evidence, one had to come to the conclusion that the debtor, for the purpose of getting this scheme approved, had in secret offered two creditors, in consideration of their withdrawing their claims, terms which were or might be better than those submitted to the other creditors, then, if those two creditors accepted those terms and thereupon withdrew their claims, that would be a very good reason indeed why the Court should refuse to sanction this scheme. But on the facts I am not satisfied that this is the case at all. It is quite true, and one ought to mention it, that the moment these two creditors knew that exception was being taken to what had been done, they expressed their willingness to give up the benefit of the declaration of trust. I do not think that that would get rid of the objection based on this transaction if it was in fact an objectionable transaction, and one which the debtor ought not to have entered into; but, in my judgment, the point where the objection fails is this: that it would not in truth be a good reason for refusing sanction to the scheme if that which was done in respect of these two creditors was in no sense a bargain made by the debtor. When I speak of a "bargain," I do not mean only a bargain which was in form a bargain made by the debtor. If, in substance, an arrangement were made with a creditor with the knowledge and on behalf of the debtor, whereby that creditor would get an advantage over the other creditors, I should say that would be quite a sufficient reason for not sanctioning the scheme. But in the present case I am not satisfied that this arrangement which was made through the debtor's brother was one which he, the debtor, had knowledge of at all. On the contrary, in answer to a question put to him in his public examination, when reopened for the purpose, the debtor stated positively that he had been no party to the terms being given to the two creditors, and had had

nothing to do with the matter. The learned registrar, who saw the debtor, and had, no doubt, in the course of these proceedings, opportunities of judging of his conduct and demeanour, came to the conclusion that he might in this matter rely upon the statement made in evidence by the debtor. If one accepts that conclusion, the result is this: that, so far from this being a bargain made by the debtor, or a bargain made on his behalf with his knowledge, it was a bargain made by a third person without any knowledge whatever on the part of the debtor. Under those circumstances, it seems to me we ought not to review this decision of the learned registrar on the ground suggested.

That disposes of what, to my mind, is the only serious point in the case. But another point was made, namely, under s. 3 of the Bankruptcy Act, 1890. That section provides, in sub-s. 9, that "If any facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate." Now, first of all, the facts referred to in the earlier part of that sub-section, that is, such facts as would justify the Court in refusing to approve the proposal, do exist in the present case. But then we come to the latter part of the sub-section: "Unless it" (the proposal) "provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate." Now, on the official receiver's report, if these released debts, as they have been called, are excluded, there is ample security for the payment of 7*s.* 6*d.* in the pound. But it is said we ought to read those words as meaning, not the liabilities and debts which are now provable, but those which were provable at the moment of the making of the receiving order. I do not think so; I think that would be to put a very unnatural meaning on those words. I cannot leave out of consideration what the security is to be for. It is to be for the payment of this amount on all

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the unsecured debts that are now provable against the debtor's estate. Nothing whatever is now payable in respect of those debts which have been withdrawn or released. They have been released, and they have gone; and, in my opinion, it would be a very unnatural construction of the latter part of this sub-section to say that it applies to all debts that were provable at the date of the receiving order, and not to those only which still continue provable at the moment when the scheme comes up for approval.

I will now deal with one more matter only—one of a much more general nature. It was said by Mr. Macaskie that in this case we ought to refuse to sanction this scheme because of the debtor's conduct. I am far from saying that a debtor may not have been guilty of misconduct leading, it may be, to his failure and to the receiving order being made against him; and it would be contrary to public policy in such a case for the Court to sanction a scheme, even though particular creditors of the debtor guilty of the misconduct might raise no objection to the scheme. There have been in the past cases, some of which have been reported, of such gross misconduct on the part of the debtor as to vitiate the scheme; but, in my judgment, there is no rule that any misconduct will justify the Court in refusing to sanction a scheme: the misconduct must have been such as would make it against public policy to sanction the scheme; that is, the misconduct must have been of a gross character. Now, what is the misconduct suggested here? In substance, it is only that the debtor has been guilty of rash and hazardous speculations leading to his insolvency; but to say that that is a ground upon which the Court should refuse to sanction the scheme would be, in effect, to say that, in cases where that is reported by the official receiver, there can be no scheme. That cannot be so, for the very terms of this sub-s. 9 shew that in cases where the facts are such that the debtor's discharge might be refused or suspended—one of those cases being the report of the official receiver that the insolvency was brought about by rash and hazardous speculation—then the scheme is not to pass, unless this condition is present, namely, that it provides reasonable security for

payment of 7*s.* 6*d.* in the pound upon all the provable unsecured debts. The Act does not say that there is to be no scheme sanctioned at all. To my mind, though there might be a case where the rash and hazardous speculations had been so continued or of such a character as to make it against public policy that a man who might be described as a confirmed gambler should get a scheme sanctioned at all, this is not a case of that sort. In my judgment, the learned registrar has exercised a proper discretion in the matter, and therefore the appeal must be dismissed.

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ROMER L.J. I agree.

COZENS-HARDY L.J. I agree.

Appeal dismissed.

Solicitors: *Seal & Edgelow; Needham, Tyler & Barrow; Solicitor to the Board of Trade; Watson & Watson.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

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BYNOE *v.* GOVERNOR AND COMPANY OF THE BANK OF ENGLAND AND WILLIAMS.

Action against Witness for negligently giving False Evidence—Criminal Prosecution—Conviction unreversed.

A person, who has been convicted of a crime, and against whom the conviction stands unreversed, cannot maintain an action against a witness for negligently giving false evidence which caused him to be wrongfully so convicted.

APPLICATION for leave to appeal from an order of Jelf J. at chambers, dismissing an action on the ground that the statement of claim shewed no reasonable cause of action, and refusing leave to appeal.

The statement of claim, so far as material to this report, was as follows:—

1. The plaintiff was, at the time of the matters hereinafter complained of, a fully qualified physician and surgeon, holding

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the double qualification and registered on the General Medical Register, residing and carrying on the profession or business of a general practice in medicine, surgery, and dental surgery at 1, Endsleigh Gardens, London, N.W.

2. By virtue of divers Acts of Parliament, charters and provisions of Government passed, granted and made as well for the profit of the defendant corporation as for the public benefit, the Governor and Company of the Bank of England (hereinafter called the Bank of England) were constituted and are the issuers and custodians for value of a portion of the national currency, that is to say, of the note issue of the Bank of England.

3. It is one of the duties of the Bank of England, as such issuers and custodians as aforesaid, to check the return from circulation of Bank of England notes, and for that purpose to keep proper books of account and to make and preserve entries shewing the dates on which and the times at which the notes of the Bank of England are severally returned from circulation, and to be and remain prepared in the interests of public justice and for the prevention of fraud with evidence of the dates and times and generally of the circumstances of such returns from circulation respectively.

4. On January 14, 15, and 16, 1892, the plaintiff was put upon his trial at the Central Criminal Court on a charge of forgery.

5. In the course of the said trial it became and was held by the presiding judge who tried the case to be material to the issue and of the utmost importance and necessity in determining the value of the alibi set up by the defence, and which alibi the judge declared was "perfect" up to one o'clock, that the prosecutor should prove on what day, and at what time or times of such day, certain Bank of England notes of the aggregate value of 415*l.* were returned to the Bank of England from circulation, and by whom.

6. The Bank of England, in pursuance of such duty as aforesaid, attended by their proper officer, namely, by the defendant Charles John Williams, at the said Court and by such officer informed the Court, purporting to give such

information from the records of the Bank of England, that the said notes were returned to the Bank of England from circulation at one and the same time and by the same person "after lunch" on May 5, 1891.

7. The said information, which was supplied to the Court as aforesaid from the records of the Bank of England, was, and has been admitted both by the Bank of England and by the defendant Charles John Williams to have been, erroneous and given from erroneous and negligently prepared records, and was given by the defendant bank falsely and negligently and in breach of their duty as aforesaid.

8. Owing to the negligence, misfeasance, and breach of duty of the Bank of England as aforesaid the plaintiff was wrongfully convicted on the said charge, and has thereby suffered damage.

9. As against the defendant Charles John Williams and through his negligently giving such false evidence as aforesaid the plaintiff was wrongfully convicted, and has thereby suffered damage.

The plaintiff in person.

C. W. Mathews, for the defendants.

Cur. adv. vult.

Jan. 31. COLLINS M.R. read the following judgment:— The plaintiff was unrepresented by counsel in this case, and no authorities were cited by the defendants. We, therefore, thought it well to look a little closer into the law before giving judgment. The plaintiff asks leave to appeal from an order of Jelf J. dismissing his action on the ground that the statement of claim discloses no cause of action. The claim is against the Bank of England and their officer, Charles J. Williams, on the grounds stated substantially in paragraphs 3 to 9 of the statement of claim. This claim is obviously open to many objections based on the immunity of witnesses and other points, some of which might possibly have been cured by amendment. There is, however, one broad principle lying at the root of the whole matter, to which we drew attention

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during the argument—namely, that, as long as a conviction stands, "no one against whom it is producible shall be permitted to aver against it": see note to Duchess of Kingston's case, 2 Sm. L. C. 10th ed. 713, where the authorities are collected. In a modern case, *Basebé* v. *Matthews* (1), the point was raised that this doctrine could not be held to defeat an action for malicious prosecution which resulted in a conviction from which, as here, there could be no appeal, and which, therefore, remained unreversed. The point arose on a demurrer, which admitted malice and want of reasonable and probable cause. The Court, however, overruled the argument. Byles J. said: "I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment, it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderberg* v. *Blake* (2), where Hale C.J. says that 'if such an action should be allowed'—that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper Court—'the judgment would be blowed off by a side-wind.'" Montague Smith J. was of the same opinion, and cited the judgment in the case of *Castrique* v. *Behrens* (3) in which Crompton J. said: "There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage. . . . But in such an action it is essential to shew that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such a termination. The reason seems to be that, if in the proceeding complained of the decision was against the plaintiff, and was still unre-

(1) (1867) L. R. 2 C. P. 684. (2) (1661) Hardr. 194.
(3) (1861) 3 E. & E. 709, 721.

versed, it would not be consistent with the principle (1) on which law is administered for another Court, not being a Court of appeal, to hold that the decision was come to without reasonable and probable cause." Montague Smith J. continued: "The only ground upon which Mr. Wood (the plaintiff's counsel) has attempted to distinguish this case from the current of authorities is that here the plaintiff had no opportunity of appealing against the conviction. If we yielded to his argument, we should be constituting ourselves a Court of appeal in a matter in which the Legislature has thought fit to declare that there shall be no appeal. It was intended that the judgment of the magistrate in a case of this sort should be final. It cannot be impeached in an action." A witness charged with negligence only is clearly not in a worse position than a prosecutor who admits malice and want of reasonable and probable cause. It is clear, therefore, that the plaintiff has no possible cause of action, and his application must be dismissed.

ROMER L.J. and MATHEW L.J. concurred.

Application dismissed.

The plaintiff in person.

Solicitors for defendants: *Freshfields & Williams.*

(1) *Sic* in the original report: "principles" in the citation by Montague Smith J.

E. L.

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Jan. 15, 16, 31.

[IN THE COURT OF APPEAL.]

SAUNDERS *v.* WHITE.

Bill of Sale—Validity—Form in Schedule—Bill of Sale given by two Grantors—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Schedule.*

By a bill of sale two persons jointly and severally assigned goods described in a schedule thereto, to secure repayment of an advance. The goods so described did not any of them belong to the grantors jointly, but some belonged to one of them and the rest to the other. The schedule did not specify to which grantor the goods respectively belonged:—

Held (affirming the decision of a Divisional Court), that the bill of sale was void as not being in accordance with the form in the schedule to the Bills of Exchange Act (1878) Amendment Act, 1882.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J. and Kennedy J.) on appeal from the decision of a county court judge.

The question arose on an interpleader issue with regard to the validity of a bill of sale. The facts are stated in the report of the case in the Court below (1), and sufficiently appear for the purposes of this report from the judgment.

Mattinson, *K.C.*, and *Firminger*, for the claimant. As regards the question of form, the bill of sale is precisely in accordance with the form given in the schedule, except that it is made by more than one grantor, but it is submitted that that circumstance cannot vitiate it. According to the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1, sub-s. 1 (*b*), words in the singular include the plural, and it never could have been the intention to make it an essential part of the form that there should be only one grantor; for, if so, partners could not give a bill of sale of the partnership property. Assuming that the goods comprised in the bill of sale had been the joint property of the husband and wife, there could have been no objection to this bill of sale. There is nothing on the face of the bill of

(1) [1901] 1 K. B. 70.

sale to shew that that was not the case. It is contended therefore that, so far as concerns the provisions of s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, and the form in the schedule to that Act, there is nothing wrong with this bill of sale. A bill of sale, which is, on the face of it, in accordance with the form in the schedule, cannot be shewn by extrinsic evidence not to be in conformity with that form. Of course, it may contravene the Act in other respects, but it cannot be bad on the ground of not being in accordance with the form.

Furthermore, it is contended that there is nothing in the Bills of Sale Act (1878) Amendment Act, 1882, to prevent two grantors assigning property belonging to them severally by one bill of sale in order to secure an advance made to them jointly.

[They cited *Heseltine* v. *Simmons* (1); *Melville* v. *Stringer* (2); *Ex parte Popplewell* (3); *In re Tamplin.* (4)]

Duke, K.C., and *J. R. Atkin*, for the execution creditor. It is not necessary to discuss the question whether joint owners of goods, such as partners, can give a bill of sale in respect of them. In this case the words of the bill of sale which import a joint assignment must be rejected as surplusage, for there is no joint property comprised in the bill of sale. The question, therefore, is whether two persons, each of whom severally owns certain goods, can by one bill of sale each assign his respective goods to secure an advance. It is submitted that such a bill of sale is void as not being in accordance with the form in the schedule. It is clear on the authorities that it is of no avail that the bill of sale should on the face of it appear to be in accordance with the form, if the real transaction is not within its terms. The intention of the Legislature in framing the form was to prevent complex transactions, the effect of which might be uncertain, and not easily to be understood by a borrower; to ensure that he should not be misled into binding himself by terms the nature of which he did not fully appreciate, and should clearly know what his rights are. If two persons can grant a bill of sale like this, then any number can;

(1) [1892] 2 Q. B. 547.
(2) (1884) 13 Q. B. D. 392.
(3) (1882) 21 Ch. D. 73.
(4) (1890) 62 L. T. 264.

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and a door is opened to complicated questions such as the Legislature intended to prevent. For instance, what would be the effect of the provision of s. 7, which allows the seizure of the goods comprised in a bill of sale upon the bankruptcy of the grantor, when applied to such a bill of sale? If several persons are allowed to join in one bill of sale, a mode is provided by which the provision of s. 12, which forbids the giving of a bill of sale for less than 30*l.*, may easily be evaded.

Again, this bill of sale is bad as against an execution creditor under s. 5, because the grantors are not jointly the true owners of the goods described in the schedule, and the schedule does not specify which goods belong to the husband and which to the wife. (1)

[They cited *Ex parte Stanford, In re Barber* (2); *Thomas* v. *Kelly*. (3)]

Mattinson, K.C., in reply.

Cur. adv. vult.

Jan. 31. COLLINS M.R. read the judgment of the Court (himself, Romer L.J., and Mathew L.J.). The question on this appeal is as to the validity of a bill of sale. The Divisional Court, affirming the decision of the county court judge, have held that it was bad under the Act of 1882. The question arose upon an interpleader issue between the grantee under the bill of sale and an execution creditor of one of the grantors. The bill of sale purports to be made between Joseph William White and Emily White, his wife, of the one part, and Samuel Thomas Biggs of the other part, and it is thereby witnessed that in consideration of the sum of 80*l.* then paid to Joseph William White and Emily White by the said Samuel Thomas Biggs, the receipt of which Joseph William White and Emily White do, and each of them doth, hereby acknowledge, they, the said Joseph William White and Emily White, do, and each of them doth, hereby assign to Samuel Thomas Biggs, his executors, administrators, and assigns, all and singular the

(1) The argument on the question whether the bill of sale was bad under s. 5 is not fully given, because, as will be seen hereafter, the Court did not decide that point.

(2) (1886) 17 Q. B. D. 259.

(3) (1888) 13 App. Cas. 506.

several chattels and things specifically described in the schedule hereto annexed by way of security for payment of 80*l.* and interest thereon at the rate of 15 per cent. per annum; and the said Joseph William White and Emily White do, and each of them doth, further agree and declare that they will duly pay to the said Samuel Thomas Biggs the principal sum aforesaid, together with the interest thereon then due, by four equal monthly payments of 20*l.* each on days therein named, and do, and each of them doth, agree with Samuel Thomas Biggs to insure and produce the policy and receipts. Then follow covenants as to which no question arises. Then follows the schedule, in which a number of articles of furniture are specifically described. The facts, as found by the county court judge, are that none of the chattels named were jointly owned by the two grantors, but some of them belonged to the husband and some to the wife. There was no evidence of any agreement between the grantors altering the property as between themselves. Indeed, the bill was originally prepared by the grantee on the footing that the loan was made to the husband, and that the goods belonged to him solely, and it was not until he went to prepare the schedule that he ascertained that some only belonged to the husband and the rest to the wife. He then altered the bill to its present form. The schedule, though it named the goods, did not distinguish which of them belonged to the husband and which of them belonged to the wife; the result is that this bill of sale operates, if at all, as two separate grants of separate portions of furniture, which are not distinguished as belonging to either of the grantors. The Court below have held that such an arrangement cannot be brought into the form prescribed by the Act of 1882, and is, therefore, void under s. 9. They also held that it was bad under s. 5 by reason of the fact that the husband was not the true owner of the wife's furniture, nor the wife of the husband's at the time of the grant, and that, as to these chattels respectively, the bill of sale was void against the execution creditor.

I am of opinion that the decision of the Divisional Court was right. The transaction which it was sought to carry out

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by this bill of sale cannot stand apart from the document which purports to describe it, namely, the bill of sale. Indeed, it was not contended that it could be supported aliunde: see per Bowen L.J. in *Ex parte Hubbard, In re Hardwick.* (1) It seems to me, therefore, that the question is, Can such a transaction, if stated according to the truth, be brought within the statutory form, that is, can it be framed in accordance with the form in the schedule according to the interpretation put on those words by the decisions in this Court and in the House of Lords? See *Ex parte Stanford, In re Barber* (2), and *Thomas* v. *Kelly.* (3) In *Ex parte Parsons, In re Townsend* (4), Lord Esher says: "If they (the Legislature) have forbidden every such document except one which is made in a particular form, we are bound to give to their legislation the ordinary meaning of language. It seems to me that the words of s. 9 strike at all documents which give a security upon goods for the payment of money, and I take it the Legislature intended to say, If you cannot make your agreement by a document in the form specified in the schedule, you shall not be able to make it by any document at all." And it was there held that, the transaction being one which, from its nature, it was impossible to carry out in the statutory form, the document describing it was void as substantially deviating from the prescribed form. In *Thomas* v. *Kelly* (5) the present Lord Chancellor says: "I think that the 9th section must be construed to enact not only what a bill of sale must contain, but also what it must not contain; so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by the statute is not appropriate." And further on he says: "The form is here, in my judgment, intended to be exhaustive of what may or may not be included in such a deed." The judgment of Lord FitzGerald seems to me to be on the same lines, and though Lord Macnaghten says of s. 9,

(1) (1886) 17 Q. B. D. 690, at p. 698.

(2) 17 Q. B. D. 259.

(3) 13 App. Cas. 506.

(4) (1886) 16 Q. B. D. 532, at p. 545.

(5) 13 App. Cas. 506, at pp. 511, 512.

"This section seems to me to deal with form and form only," I do not think he meant to lay down anything inconsistent with the passages I have cited from the judgment of the Lord Chancellor. Indeed, it seems to me to follow from the fact that the Legislature has prescribed a particular form in which alone a valid bill of sale can be shaped that it thereby excluded from documentary validity all transactions which, if described according to the true facts, could not be brought substantially within the form. I say documentary validity, for, as pointed out particularly by Bowen L.J. and Fry L.J. in many cases, a transaction may stand apart from the document which embodies it. But, where it has to seek support from the document, it must stand or fall with it. I cannot, therefore, accept the argument that, if a document be so framed as to make it possible to construe it in such a way as not to be incompatible with the form, it cannot be impeached, although if construed as describing the real transaction it would be outside the form. In this case the document can be construed in accordance with the facts only by reading the joint words of grant as superfluous and confining the effect of the grant to two separate grants by the husband of his chattels and by the wife of hers. I do not think that it would be possible to claim protection for a transaction incapable of being described according to the facts in the statutory form by misdescribing it in the form so as to bring it apparently within the schedule, and I think the authorities I have cited are conclusive to this effect: see also per Fry L.J. in *Beckett* v. *Tower Assets Co.* (1) The learned Lord Justice there says: "Upon principle, that is to say, on the plain construction of the statute, it seems to me clear that, in considering whether the Bills of Sale Act applies, the Court not only may but must inquire into the real nature of the transaction. . . . . Again, the real truth of the transaction must be applied to the construction of documents for the purposes of the Act, and if a document construed according to the true nature of the transaction be within the Act, then it will not be protected by its form."

(1) [1891] 1 Q. B. 638, at p. 644.

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Does then the schedule contemplate and cover two separate grants by two grantors of separate sets of chattels not so described as to be capable of being referred specifically to either grant? If it covers two grants, why not three or more? And where is the line to be drawn, and what is the object of the provision for specific description of the chattels, if in such a case the bill and the schedule together do not shew to which section of the things granted each grant is applicable? It seems to me that to hold that two or more separate grants could be brought within the terms of the schedule would involve such an extension of the symbol A.B., which is used to describe the grantor in the schedule, as to involve a departure from the statutory form in something which, in the language of Lord Macnaghten in *Thomas* v. *Kelly* (1) "is a characteristic of that form," and to introduce inadmissible complications. I think the reasoning of Bowen L.J. in *Melville* v. *Stringer* (2) covers this case. He there said: "The principle which *Davis* v. *Burton* (3) has decided is, I think, that nothing is to be taken from that form, or added to it, which substantially makes a variation from it. If one examines the form, a substantial part of it is, as it seems to me, that property must be assigned to the person who finds the money, and that to such person repayment is to be made of the money borrowed; and therefore I do not think that a bill of sale is within the Act if the money is lent by one person and made repayable to another person, or if the property is assigned by it to one person and the repayment is to be to another, nor if the assignment of the property is to one person to secure repayment to another. Mr. French has contended that that construction would exclude from the Act the case of a trustee to whom property has been assigned for securing the repayment of money for those beneficially interested therein. My answer is that that is an illustration of what is struck at by this s. 9, which section is against any substantial variation of the form. If that is what that section means, can it be said that an assignment to parties who are not joint creditors when the repayment is not to be

(1) 13 App. Cas. 506. (2) 13 Q. B. D. 392, at p. 401.
(3) (1883) 11 Q. B. D. 537.

of the sum secured to those creditors jointly, but only of portions of such sum to each of them separately, is in accordance with the form in the schedule? So far from it being such, I think it is inconsistent with that form, and is therefore invalid." If the form were capable of being extended so as to cover several separate grants by separate grantors and covenants incident thereto, I do not see why it could not be extended to cover all the transactions negatived as admissible by Bowen L.J. in the passage above cited. I think it is clear on the face of the schedule that only one grant is contemplated, though it may be, but it is not necessary to decide it, that that grant might be made by two or more joint owners, and I think the same complication in the case of several separate grantees which was held to avoid the bill of sale in *Melville* v. *Stringer* (1) would arise in the case of several separate grantors, and for the reasons pointed out by all the judges in that case be on that ground outside the schedule. There would in point of fact be two separate bills of sale in one document, and the subject-matters of the bills would be undefined by the instrument itself so as to be incapable of being specifically referred to either of them. This would surely be to sin against that simplicity and certainty which is said to have been the main object of the Legislature: see per Lord Esher M.R. in *Melville* v. *Stringer* (1), and per Lord FitzGerald in *Thomas* v. *Kelly*. (2) I find nothing in *Heseltine* v. *Simmons* (3) inconsistent with the views above stated. There the objection was treated as going to the truth of the consideration only, which is the subject of a special section. The larger question of whether it would have been possible to state the true consideration without departing from the statutory form was not raised or discussed. It was decided after *Melville* v. *Stringer* (1) and *Ex parte Parsons* (4), to both of which cases Lord Esher, who was a member of the Court that decided it, had been a party. It cannot, therefore, I think, have been meant to decide anything inconsistent with the principles laid down in those cases.

(1) 13 Q. B. D. 392.
(2) 13 App. Cas. 506.
(3) [1892] 2 Q. B. 547.
(4) 16 Q. B. D. 532.

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As in my opinion the bill of sale is bad on the grounds above stated, it is not necessary to consider the point taken under s. 5.

Appeal dismissed.

Solicitors for claimant: *Biggs-Roche, Sawyer & Co.*
Solicitors for execution creditor: *Willett & Sandford.*

E. L.

C. A. 1902 *Jan.* 20.

[IN THE COURT OF APPEAL.]

THE COUNTY THEATRES AND HOTELS, LIMITED *v.* KNOWLES.

Practice—Agreement to Refer—Legal Proceedings in respect of Matter agreed to be referred—Application for Stay—Step in Proceedings—Summons for Directions—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*Order* XXX., *rr.* 1, 2.

An action was brought for breach of a written contract which contained an agreement to refer matters in dispute between the parties. The defendant attended at chambers on the hearing of a summons for directions taken out by the plaintiffs, on which an order was made that the plaintiffs and defendant should respectively make discovery of documents. The defendant subsequently applied under s. 4 of the Arbitration Act, 1889, for a stay of proceedings:—

Held, that the defendant had taken a step in the proceedings, and was, therefore, not entitled to a stay.

APPEAL from an order of a judge at chambers.

The action was brought for breach of a written contract, in which there was an agreement to refer all matters in dispute between the parties.

The plaintiff took out under Order XXX. a summons for directions, which was served upon the defendant, who attended by his solicitors in chambers at the hearing. The summons was in the usual form, and an order was made upon it that a statement of claim containing full particulars should be delivered in seven days: that a statement of defence containing full particulars should be delivered in ten days from delivery of statement of claim: that a reply, if necessary, should be delivered in seven days after delivery of statement of defence: and that "the

plaintiffs and defendants do, respectively, after delivery of defence, and within ten days after service of copy receipt for deposit in court, answer on affidavit stating what documents are or have been in their possession or power relating to the matters in question": and directions were given as to place and mode of trial.

Subsequently, and before delivery of statement of defence, the defendant took out a summons under s. 4 of the Arbitration Act, 1889, to stay proceedings, on the ground that the action was in respect of a matter agreed to be referred by the contract between the parties. Lawrance J. refused to make the order asked for.

The defendant appealed.

Newton Crane, for the defendant. The judgment of Lindley L.J. in *Ives* v. *Williams* (1) shews that a step in the proceedings, to be an answer to an application for a stay under s. 4 of the Arbitration Act, 1889, must be something in the nature of an application to the Court. The summons served on the defendant was taken out by the plaintiffs, and stated that mutual discovery would be asked for. An order could have been made on that summons without any acquiescence on the part of the defendant, and his attendance at the hearing, even admitting that he raised no objection to the order being made, was not a step taken by him in the proceedings. In *Chappell* v. *North* (2) obtaining an order to administer interrogatories was held to be a step in the proceedings; but in this case the defendant did not ask for the order, and nothing was done on the initiative of the defendant.

Montague Lush and *Randolph*, for the plaintiff, were not called on.

COLLINS M.R. I think the decision of the learned judge was right. It seems to me that the case last cited to us of *Chappell* v. *North* (2) is in point; but even if it were not, this case is clear upon principle. That which Order XXX. has done is to enable the parties to obtain on one summons an order, with respect to all interlocutory proceedings to be taken in the action, which

(1) [1894] 2 Ch. 478. (2) [1891] 2 Q. B. 252.

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they might, before this rule took effect, have obtained on several distinct summonses. The parties appear before the master with, as it were, a blank sheet on which he may make this inclusive order. When he does so, with the acquiescence of both parties, there is just as much a step in the proceedings by each of the parties as if an order had been made on his separate application. The defendant might have objected to the making of the order on the ground of the agreement to refer differences; but he did not do so, and is not in a position to ask for a stay under s. 4 of the Arbitration Act. The appeal must be dismissed.

ROMER L.J. and MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Stanley, Woodhouse & Hedderwick.*
Solicitors for defendant: *Thomas Beard & Sons.*

A. M.

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[IN THE COURT OF APPEAL.]

MICHAEL *v.* HART & CO.

Contract—Measure of Damages—Contract to carry over Stock on the Stock Exchange — Client's Account closed by Broker—Anticipatory Breach—Period with reference to which Damages to be calculated.

The defendants, who were stockbrokers, agreed with the plaintiff to carry over to the end of May account on the Stock Exchange certain stocks which they had purchased for him, and made the necessary arrangements with jobbers for that purpose. Before the settling day arrived they closed the plaintiff's account without instructions by selling the stocks. Upon being informed of the closing of his account, the plaintiff gave the defendants notice that he should insist on performance by them of their contract when the settling day arrived. At the time when the defendants closed the plaintiff's account the prices of the stocks were falling, but shortly afterwards they rose again, and they were higher at the end of May settlement, having been still higher during the interval between the closing of the plaintiff's account and the end of May settlement. In an action brought by the plaintiff against the defendants after the end of May settlement for non-performance of their contract to carry over the stocks, the defendants contended that the damages ought to be assessed with reference to the prices of the stocks when the defendants

closed the plaintiff's account, and that so assessed they would be nominal:—

Held, that the defendants' contention was incorrect, and that the plaintiff was entitled to insist on performance of the defendants' contract at the end of May settlement, and to measure his damages with reference to the prices of the stocks at that date.

Query, whether the plaintiff had a right to have the damages estimated with reference to the highest prices at which the stocks had stood in the interval between the closing of the plaintiff's account and the end of May. (1)

APPEAL from a judgment of Wills J. on further consideration (2) in an action tried before him with a jury.

The action was for breach by the defendants, who were brokers on the London Stock Exchange, of a contract to carry over for the plaintiff certain stocks from the account in the middle of May to the account at the end of May, 1901.

In April, 1901, the plaintiff opened an account with the defendants, and employed them to buy and sell stocks for him, and he deposited with them certain bank shares to secure any balance which might from time to time be due from him to them in respect of such transactions. It was alleged by the plaintiff that it was agreed between the defendants and himself on May 11, 1901, that certain stocks which had been purchased by the defendants on the plaintiff's account on the Stock Exchange for the settlement in the middle of May, 1901, should be carried over to the next settlement at the end of May. The defendants denied that they had unconditionally agreed to carry over the stocks, alleging that they only agreed to carry them over on condition that the plaintiff would pay to them all differences then due upon his account in excess of 1000*l.*, and that he would provide further cover, if the condition of the market, which was then in a very uncertain state, should require it. The defendants arranged with jobbers to carry the stocks over to the end of May, and on May 12 they sent continuation notes in the usual form to the plaintiff; but they nevertheless closed the plaintiff's account

(1) As will be seen, there was a compromise between the parties on this point, so that the Court was not called on to decide it.

(2) [1901] 2 K. B. 867.

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by sales of the various stocks on May 14, 15, and 16, the case set up by them being that they were entitled to do so, on the ground that the plaintiff had failed to comply with the before-mentioned conditions. The question was left to the jury whether the agreement to carry over the stocks was unconditional as alleged by the plaintiff, or conditional as alleged by the defendants, and the jury found a verdict on that question in favour of the plaintiff. The parties agreed to leave the question of the amount of the damages to the judge. It appeared that the prices of the stocks were falling when the defendants closed the plaintiff's account, but they rose again shortly afterwards, and were higher at the end of May settlement, having been higher still during the interval between the closing of the plaintiff's account and the end of May. Upon the defendants giving notice to the plaintiff on May 15 that they had begun to close his account, and sending him contract notes in respect of the stocks sold by them on the 14th, he placed the matter in the hands of his solicitors, who at once wrote to the defendants to the effect that they had agreed to carry over the stocks, and that under the circumstances the plaintiff repudiated the loss on realization of the securities mentioned in the contract notes forwarded, and that, should they dispose of the residue of his holding during the then present account without instructions from him, they would do so at their own risk. On May 21, 1901, the plaintiff's solicitors further wrote to the defendants as follows: "We have now obtained counsel's opinion upon this matter, and are advised that you have made a grievous mistake in realizing our client's stocks. We are further advised that Mr. Michael has a right, upon payment to you of 3645*l.* 13*s.* 8*d.*, to have the bank shares handed over, and also to have the benefit of all the carrying over contracts entered into at the last settlement. We hereby offer you payment of that sum, and shall be glad to receive an appointment for that purpose. We are further advised that, in the event of your declining to accede to that course, Mr. Michael will have a right to instruct you to realize any of these stocks at his discretion at ruling prices during the current account, and we think it right to give you notice of

this fact, in order that you may retrieve the mistake you have made, and clear yourselves. We are also advised that, in the event of neither of these matters being carried out, our client will have a good cause of action against you for damages to recover the differences between the carrying-over prices at the last settlement and the selling prices at the end of the current settlement. We shall be glad to know what course you propose to pursue." The defendants then placed the matter in the hands of their solicitors, who on May 22 wrote to the plaintiff's solicitors, stating that the defendants had referred the matter to them, in case the plaintiff's solicitors had any further communications to make thereon, and that they would be ready to accept service of process on the defendants' behalf. On May 24 the plaintiff's solicitors wrote to the defendants' solicitors as follows: "Referring to your letter of the 22nd instant, we have no further communication to make at present, except to say that our client will seek to make yours responsible for whatever prices may be reached during the current account for the several stocks which your clients have wrongfully closed. When the current account is over, and the damages can be measured, a writ will be issued." The plaintiff did not give the defendants instructions to sell any of the stocks prior to the settling day. The learned judge held on further consideration that the damages ought to be assessed at the highest prices to which the stocks had risen between the closing of the plaintiff's account and the end of May settlement. An application was made for a new trial by the defendants on the ground of misdirection, and that the verdict was against the evidence, but the Court of Appeal (Collins M.R. and Stirling L.J., Mathew L.J. dissenting) dismissed the application.

Lawson Walton, K.C., and *Herbert Reed, K.C.* (*H. Kisch* with them), for the defendants. First, the damages must be estimated with reference to the prices of the stocks at the time when the defendants closed the plaintiff's account. If so estimated, they would be nominal only, for prices were then falling, and the plaintiff could have replaced the stocks sold

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without loss. The closing of the account was an actual, and not merely what has been called an anticipatory, breach of contract. There is in a case like this more than a mere prospective announcement of intention not to perform the contract on the settling day. The carrying over stands on the same footing as an original purchase of stocks. The contract of the broker with his client is that he will, if possible, effect a contract according to his instructions with a jobber for the purchase of the stocks, that he will not do anything to determine that contract when effected before the settling day, and that the jobber shall carry it out when that day arrives. He puts himself in a position to perform his contract with his client by entering into a contract with a jobber for stock which he can deliver to the client on the settlement. It is submitted that, if, having entered into such a contract, he closes the account without instructions by selling the stock before the settling day, he has actually broken his contract with his client by destroying the interest which the client had in the contract effected by his instructions between the broker and the jobber. The case is not analogous to that of a vendor of unspecific goods to be delivered at a future day, such as *Roper* v. *Johnson*. (1) The broker is not in the position of such a vendor of goods. He is employed by the client as an agent to effect a contract for the purchase of the stocks with a jobber, and, by wrongfully closing the account, he does not merely announce by way of anticipation that he will not perform his contract when the time for performance comes, but he sacrifices his client's interest, so that there is an irreparable breach of contract. If a party to a contract to be performed at a future date, such as a vendor of goods to be delivered in futuro, merely announces his intention prospectively not to perform the contract at that date, no doubt there is no breach, unless the other party to the contract elects to treat that announcement of intention as such; for there no actual step has been taken in derogation of the contract, and it may ultimately be performed, but in this case performance is rendered impossible by the closing of the account.

(1) (1873) L. R. 8 C. P. 167.

[MATHEW L.J. Why is it rendered impossible? The brokers might have made fresh contracts for the purchase of the stocks so as to be able to deliver them to the client on the settling day.]

That is putting the broker in the position of a vendor of the stock. That is not his position. He is no doubt a principal as between himself and the jobber; but, as between himself and the client, he is an agent to make a contract for the purchase of the stock, and his obligation, having made such a contract on behalf of his client, is not to determine it by closing the account without instructions before the settling day. The person ultimately liable as vendor is the jobber.

Secondly, assuming that the defendants are wrong on the first point and therefore the plaintiff is entitled to substantial damages, it is submitted that the measure of damages adopted by the learned judge cannot possibly be correct. He proceeded on the ground that the plaintiff might at any time before the settlement have instructed the defendants to sell the stocks. The plaintiff never did in point of fact give any such instruction to the defendants. The object in assessing damages for breach of contract is to arrive as nearly as possible at the real loss sustained by the plaintiff. The measure of damages adopted by the learned judge cannot be said to do this. It is wholly unreasonable that the plaintiff should be allowed to lie by until the settling day, without giving any notice to the defendants that he wishes to sell at any time in the interim, and then claim the benefit of the extravagant presumption that he must be taken by some happy inspiration to have selected the moment when the prices of the stocks respectively were at their very highest to give instructions for the sale of them to the defendants. In the absence of instructions to sell, how can the brokers take steps to minimise the loss? How can they tell, till the settling day arrives, what the highest prices will be? The plaintiff cannot approbate and reprobate with regard to the same transaction. He declines to treat the closing of the account as a breach, and insists that the contract is still subsisting; and, that being so, he cannot, without having really given any instructions to sell the stocks, claim damages

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as for a refusal to do so. The learned judge has applied the principle that everything is to be presumed against a wrongdoer. That principle may be applicable in the case of a conversion or tortious detention of property, or a misappropriation of trust funds, but not in a case of a breach of contract like the present.

[COLLINS M.R. Has the principle applied in this case by the learned judge ever been applied to the assessment of damages except in cases where there was a continuous obligation to restore property or funds?]

It is submitted that the applicability of the principle is confined to such cases. There is no analogy between such cases and the case of a breach of a contract to be performed at a certain date. The plaintiff cannot blow hot and cold; he cannot decline to treat the closing of the account as a breach of contract for one purpose, and at the same time treat it as a breach for the purpose of getting the benefit of the principle that everything must be presumed against a wrongdoer.

[They cited *Williams* v. *Peel River Land and Mineral Co.* (1); *M'Arthur* v. *Lord Seaforth* (2); *Shepherd* v. *Johnson* (3); *Murray* v. *Hewitt* (4); *Samuel* v. *Rowe.* (5)]

Rufus Isaacs, K.C., and *A. J. David* (*W. Carnelley* with them), for the plaintiff.

[The Court intimated that they need not argue the first point. Shortly after they had commenced their argument on the second point, the counsel for the parties conferred, and subsequently stated that, on the assumption that the Court was against the defendants on the first point, a compromise had been arrived at with regard to the mode in which the damages were to be computed, without prejudice to any appeal to the House of Lords on the first point or on the question whether there ought to be a new trial.]

COLLINS M.R. The question raised on this appeal is as to the measure of damages in an action for breach of contract brought

(1) (1886–7) 55 L. T. 689.
(2) (1810) 2 Taunt. 257; 11 R. R. 559.
(3) (1802) 2 East, 211.
(4) (1886) 2 Times L. R. 872.
(5) (1892) 8 Times L. R. 488.

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against stockbrokers by their client. The case set up by the plaintiff is that the defendants entered into an agreement with him for the carrying over of certain contracts for the purchase of stocks, which had been made by them on his account, from the mid-May account to the account at the end of that month, and that, having made arrangements for carrying the stocks over accordingly, they nevertheless proceeded a day or two afterwards, and before the account day at the end of May, without instructions from the plaintiff, to close his account. The defendants' case was that they had not agreed to carry over the account as alleged by the plaintiff, but had only agreed to carry it over on certain conditions which had not been performed. At the trial of the action with a jury, the plaintiff obtained a verdict on the issue whether there had been an unconditional agreement as alleged by him. The defendants applied to this Court for a new trial, but the majority of the Court held that there ought not to be a new trial. The question as to the amount of the damages was not left to the jury; but it was agreed that it should be decided by Wills J. It was subsequently argued before him, and he then gave the judgment against which the defendants now appeal. The points raised before the learned judge appear to have been the same which have been raised before us. It is argued on behalf of the defendants, in the first place, that the closing of the plaintiff's account by the defendants was a final breach of the defendants' contract with the plaintiff. It is said that, inasmuch as that closing of the account was effected by releasing the jobbers with whom the defendants had carried over the stocks from their contracts, that for some reason or other affected the right of the client in suchwise that he was bound to treat that repudiation of their contract by the defendants as a final breach, and the only breach of which he could take advantage: in other words, it is said that there was a breach of such a nature, having regard to the relation between stockbroker and client, that there was no option on the part of the plaintiff afterwards to insist on the contract, and wait till the date fixed for performance, and then measure his damages with reference to that date, but he was bound

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to treat the contract as rescinded upon the closing of his account, and measure his damages with reference to the date at which it was so closed. I cannot assent to this argument. The general rule, which is laid down with regard to such cases, is that, where there has been what has been called an anticipatory breach of contract going to the whole consideration, it has not of itself the effect of rescinding the contract, for there must be two parties to a rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; but, on the other hand, he may refuse to treat the contract as rescinded, and hold the party repudiating the contract to his obligation when the time fixed for performance arrives. That appears to me to be in substance the law on the subject as laid down by Cockburn C.J. in the case of *Frost* v. *Knight*. (1) In delivering judgment in that case the Chief Justice stated the result of the authorities to be as follows: "The promisee, if he pleases, may treat the notice of intention"—i.e., intention not to perform the contract—"as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which

(1) (1872) L. R. 7 Ex. 111.

may have afforded him the means of mitigating his loss." In that case the action was for breach of promise of marriage, the defendant having broken off the engagement before the time for performance of the promise had arrived. A case somewhat nearer the present in its nature is that of *Roper* v. *Johnson*. (1) There the action was for breach of a contract for the sale of coal to be delivered in the months of May, June, July, and August. The defendant, soon after the contract was entered into, appears to have intimated to the plaintiffs his determination not to perform it; and that repudiation of the contract was undoubtedly accepted as a breach of it by the plaintiffs on July 3, because they then brought their action for damages for non-performance of the contract. Keating J. in delivering judgment said: "The difficulty as to the measure of damages, or rather as to the principle on which the damages are to be assessed, arises from the circumstance of the time for delivery of the coal extending over the whole of the month of August. Had the action been delayed until after the expiration of the time for the completion of the contract, we should have entertained but little doubt; for the case would then have been distinctly within the authority of *Brown* v. *Muller* (2), and we should have considered ourselves bound by that decision. But the difficulty here arises from the fact of the action having been brought on the 3rd of July. In *Brown* v. *Muller* (2) it was clearly decided that, where the contract is for the delivery of goods in equal proportions in a given number of months, and the action for non-delivery is not brought until after the expiration of the period stipulated for the last delivery, the proper measure of damages is the sum of the differences between the contract and market prices on the last day of each month respectively. That was the proper measure of damages there. But here the breach occurred before the end of the period over which the contract extended: and the question is, what is the proper measure of damages in such a case." The learned judge then proceeded to state the argument for the defendant, which was that the only measure of damages was the loss which had resulted to

(1) L. R. 8 C. P. 167. (2) (1872) L. R. 7 Ex. 319.

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the plaintiffs at the time of the breach relied on; that the proper mode of ascertaining the amount of that loss was to inquire upon what terms the plaintiffs could have gone into the market, and obtained a similar contract on that day; and therefore it was incumbent on the plaintiffs to give evidence of loss ascertained in that manner, by shewing what would be the difference between the contract price and the price at which they could have obtained a similar contract on the day of the breach, or that they were unable to obtain such a contract at all. The learned judge said that it appeared to him that the plaintiffs could not be called upon to give evidence of that sort, and he therefore proceeded to hold that, in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the proper measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery. The point which arose and was considered in that case appears to have depended on the fact that the plaintiffs had brought their action before the period for completion of the contract had expired, and therefore had elected to treat the repudiation of the contract by the defendant as a breach of it. The question as to the possible measure of damages suggested by the defendant's counsel would not have arisen, unless the plaintiffs had elected, as the plaintiff has not here, to treat the repudiation of the contract by the defendant as a final breach by commencing their action before the period fixed for completion of the contract. The rule of law on the subject is also very well explained by Lord Esher M.R. in the case of *Johnstone* v. *Milling*. (1) In the present case the action was not brought till after the time at which the contract ought to have been performed by the defendants, and the plaintiff, upon notice of the closing of his account, distinctly insisted on performance of the contract, and that the defendants' obligation continued up to the date of the settlement. Under these circumstances the defendants' counsel argue that the damages ought to be calculated with reference to the prices of the stocks at the time of the closing

(1) (1886) 16 Q. B. D. 460.

of the plaintiff's account, and that, if they are so calculated, there will be no damages, or only nominal damages, and therefore that the plaintiff can only recover nominal damages. I am of opinion that, having regard to the principles laid down by the authorities to which I have referred, the contention for the defendants on this point cannot be sustained.

There is yet another alternative measure of damages which was adopted by the learned judge. He held that, if the contract remained unrescinded, the plaintiff would be entitled to instruct the defendants to sell the stocks, if he chose, at any time before the next settlement, and as on some one or more days previously to the settlement the prices of the stocks were higher than at the date of the settlement, the damages ought to be assessed with reference to the highest prices so reached. The defendants' counsel contended that, even if the defendants were wrong on the first point, the proper measure of damages was not the highest prices reached in the interval, but the prices at the date when the contract ought to have been performed by the defendants, namely, the end of May settlement. With regard to the question, which of these two alternative measures of damages ought to be adopted, if the Court were against the defendants on the first point, after the argument had proceeded some way, the counsel for the parties effected a compromise, leaving the Court to decide only the first point taken by the defendants. We therefore give judgment on that point only against the defendants, leaving the damages to be ascertained in accordance with the arrangement arrived at by the parties.

ROMER L.J. and MATHEW L.J. concurred.

Judgment accordingly.

Solicitors for plaintiff: *W. H. Martin & Co.*
Solicitors for defendants: *Beyfus & Beyfus.*

E. L.

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Nov. 23.

[IN THE COURT OF APPEAL.]

VEAZEY *v.* CHATTLE.

Employer and Workman — Compensation — Employment on Building over Thirty Feet in Height — "Scaffolding" — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A workman suffered injury while engaged in the repair of the roof of a house more than 30 feet high by means of a ladder and a crawling-board, which was a contrivance ordinarily used in the repair of roofs, and consisted of a wooden plank about 18 to 20 feet long and 10 inches wide, across which were nailed transverse pieces of wood to give support to the man while working upon it; on the under side at one end was fastened a cross-piece of wood which fitted over the ridge of the roof and kept the board in position. At the time of the accident the workman was on the roof fixing the crawling-board, while the lower end of the board was being steadied by an assistant standing on the ladder.

Held, by Collins M.R. and Mathew L.J. (Stirling L.J. dissenting), that there was evidence to justify the finding of a county court judge that the crawling-board was a scaffolding within the meaning of s. 7 of the Workmen's Compensation Act, 1897.

APPEAL from a decision of the judge of the Derby County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The applicant, a bricklayer, was employed by the respondent, a builder, upon the repair of the roof of a building exceeding 30 feet in height, and was injured by an accident arising out of and in the course of his employment. The roof was being repaired by means of a ladder and a crawling-board, which was described as being a plank 18 to 20 feet long and 10 inches wide, across which were nailed or screwed ridges of wood to give the workman a grip on the board while at work. On the under side near one end of the crawling-board was a ridge of wood, 9 or 10 inches deep and 3 inches thick, to hook over the ridge of the roof in order to hold the board steady while men were at work on it. The workmen remained on the crawling-board while at work on the roof, and shifted it as occasion required. On the day of the accident the applicant, who was assisted by a bricklayer's labourer, had repaired the slates on the front side

of the roof, and was about to repair the slates at the back. To do this the ladder was carried round the house and placed against the back wall, the top of the ladder resting against the spout on the high part of the building; the applicant then went up the ladder first, carrying one end of the crawling-board, the labourer following him up the ladder and holding the lower end of the board. When he got to the top of the ladder the applicant placed the crawling-board on the roof, but not over the ridge, which could not be done from that position owing to the way in which the ridge slates were laid; he then got on to the crawling-board in order to go up it and lift the upper end of the board over the ridge. While he was doing so, the labourer was standing on the ladder, holding on to the spout with one hand and holding the lower end of the crawling-board with the other. While the applicant was on the crawling-board the board slipped, and he fell to the ground and was severely injured. The way in which the applicant was using the crawling-board was the usual way of working. The learned county court judge found that the ladder and crawling-board were suitable for the particular purpose for which they were used, and held as a matter of law that such a combination might be a scaffolding within the meaning of s. 7 of the Workmen's Compensation Act, 1897, and further, as a matter of fact, that it was a scaffolding; he consequently made an award in favour of the applicant.

The employer appealed.

Ruegg, K.C., and *Cranstoun*, for the employer. The house was not being repaired by means of a scaffolding within the meaning of s. 7 of the Workmen's Compensation Act, 1897; the crawling-board was not a scaffolding. The view taken by this Court as to what is scaffolding within the Act in *Wood* v. *Walsh* (1), *Ferguson* v. *Green* (2), and *Maude* v. *Brook* (3) has never been disapproved of, and has not been affected by the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers & Co.* (4) In the last-named case the Court of

(1) [1899] 1 Q. B. 1009.
(2) [1901] 1 K. B. 25.
(3) [1900] 1 Q. B. 575.
(4) [1901] A. C. 49.

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Appeal had decided that the arrangement was scaffolding, and there was no appeal on that point; the observations in the House of Lords on the question of scaffolding can, therefore, only be considered as dicta. The word "scaffolding" as used in s. 7 means scaffolding in the ordinary signification of that word, and this crawling-board is not within the ordinary signification. There is no combination of parts, no structure of which one part is supported by another part; the board was simply laid on the roof, and a board laid on the floor of a room would be just as properly called scaffolding. In *Wood* v. *Walsh* (1) it was held that a ladder was not scaffolding, and therefore this crawling-board, which is no more than a horizontal ladder, cannot be scaffolding; the decision in that case has not been affected by *Hoddinott* v. *Newton, Chambers & Co.* (2) It is not sufficient that this is an ordinary mode of repairing a roof, if there is not such a combination of parts as would form a scaffolding.

Chester Jones, for the applicant. The crawling-board, used as it was in the present case, was a scaffolding; it was necessary to enable the workman to stand on the roof and was used by him to work upon. It is not a mere plank, but a structure built up by nailing cross-pieces of wood across the main plank, each of which cross-pieces is itself a platform. The crawling-board was "scaffolding" suitable for the occasion, which is the interpretation put by Lord Brampton in *Hoddinott* v. *Newton, Chambers & Co.* (2) upon the word "scaffolding" as used in s. 7 of this Act. The principle underlying all the decisions is that where there is any evidence to justify the finding of a county court judge on a question of fact, his finding will not be overruled. It is impossible to say that there is no evidence in the present case to support the judge's finding.

Ruegg, K.C., in reply.

COLLINS M.R. I have come to the conclusion, not without some difficulty, that this appeal should be dismissed. This Court has often been engaged in exercising all its ingenuity in deciding whether different arrangements employed for the

(1) [1899] 1 Q. B. 1009. (2) [1901] A. C. 49.

purpose of enabling workmen to work at some height from the ground were scaffolding within the meaning of s. 7 of this Act. But the House of Lords, in *Hoddinott* v. *Newton, Chambers & Co.* (1), has now eliminated many matters which in the earlier days of the operation of the Act created difficulty, such, for example, as the object of the Legislature in making the use of scaffolding a condition of giving compensation to workmen employed on a building. Another consideration which at one time affected my own mind was the difficulty of supposing that the condition was fulfilled when the only scaffolding suggested was a mere temporary arrangement, such as boards and trestles, inside a room; it seemed to me that the use of a temporary arrangement to enable a workman to do a totally different class of work in a room was not what the Legislature intended in this section to impose as a condition precedent to the workman's right to compensation. But those difficulties have been entirely brushed aside by the decision of the highest tribunal in *Hoddinott* v. *Newton, Chambers & Co.* (1), with the result that we have now to discuss what is a purely arbitrary provision in the Act. If that provision were simply wiped out, the position of employer and workman would, I think, be just the same; the presence or absence of scaffolding has no relation to the damage to the workman, and we have to construe an arbitrary statutory provision without any light as to the purpose for which it was inserted in the section. That is a very different position to that which obtained before the decision in *Hoddinott* v. *Newton, Chambers & Co.* (1)

No doubt in that case some of the learned judges suggested that the word "scaffolding" was used in s. 7 in its ordinary popular meaning. Lord Macnaghten said (2): "I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the Court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be"; but he went on to hold that the requirement of

(1) [1901] A. C. 49. (2) [1901] A. C. at p. 57.

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a scaffolding might be, and in that case was, answered by an arrangement composed of a board on trestles. There is no reason why the arrangement might not just as well have been a board across two chairs; that would equally have been scaffolding with the arrangement actually used, but it certainly does not appear to be the ordinary signification of the word. But Lord Brampton, who goes into the subject more specifically and at greater length, says (1): "I entirely agree with Rigby L.J., who, in his judgment in *Maude* v. *Brook* (2), says: 'In construing the Act we are not at liberty to confine the meaning of the word "scaffolding" to that which is its most usual form; anything whether usual or unusual that can properly be called scaffolding is within the Act.'" There we have clear authority to the effect that an arrangement which would not appear to ordinary persons to be scaffolding may nevertheless be scaffolding within the meaning of the Act. Lord Brampton then goes on to adopt the main part of the definition of scaffolding as laid down in certain dictionaries cited in his judgment, and suggests that a scaffolding may be supported by other means than poles, and apparently that anything serving the purpose of raising from the ground a workman engaged on a work of construction or repair might be a scaffolding; he says: "The size, height, and mechanism of it would, as a matter of fact, of course, depend upon the position in the building of the place needing construction, reconstruction, or repair, and a variety of circumstances impossible to anticipate, and which, therefore, I will not attempt to describe."

In the present case the work had to be done at a considerable height, the workman had to be lifted above the ground and to be given a secure foothold while at work, and the most convenient contrivance that could be used for this purpose was a crawling-board. This was a plank about twenty feet long, with strips of wood nailed across it at intervals to afford a foothold, and another strip of wood was nailed on at the upper and lower side of the plank which, when pushed over the ridge, kept the crawling-board in its place. At the time of the

(1) [1901] A. C. at p. 69. (2) [1900] 1 Q. B. 575.

accident one man went up a ladder carrying the upper end of the crawling-board in his hand; another man followed him holding the lower end of the crawling-board; they got the crawling-board on to the roof, but, if they had simply pushed it up the sloping roof, the slates at the ridge of the roof would have been pushed off. What they did was this: the man in advance, who was going to use the crawling-board for the purpose of his work on the roof, had to reach the ridge in order to adjust it; he therefore went up the crawling-board, while the man on the ladder had to steady the crawling-board at its lowest end, and no doubt in some measure to lift it, and it was while this was being done that the crawling-board slipped and the applicant fell from the roof and was injured. Am I in a position to say as a matter of law that such an arrangement, intended as it was for supporting the man at his work and by which he was in fact being supported at the time, could not be scaffolding within the meaning of the Act? Having regard to what I have already said, and to the nature of the work that was being done, I think that it was as much scaffolding as an arrangement composed of two trestles and a board. The workman was lifted high above the ground and was resting on the crawling-board for the purpose of doing his work; it in fact formed a platform which enabled him to get at his work, and I do not think it possible for me to hold that a board on trestles is capable of being a scaffolding within the meaning of the Workmen's Compensation Act, but that the arrangement used in the present case is not. If there were any principle to be applied in the interpretation of the word "scaffolding," it is obvious that the danger to the workman is much greater where he is using this contrivance than where he is using a board and trestles; but that is, of course, not an argument to be relied on. Here the workman was using the contrivance ordinarily employed for such work: it sustained him above the ground, and it afforded him foothold or support for the purpose of doing his work as effectually as an arrangement of board and trestles.

I am aware that in the case of *Wood* v. *Walsh* (1) it was

(1) [1899] 1 Q. B. 1009.

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held in this Court that a ladder, which at the time of the accident was standing against the wall of the house, was not scaffolding within the meaning of s. 7; I am not sure that that was intended to be a decision of law, but if it was I think it is not consistent with the principles upon which, so far as I am able to gather them, the decision in *Hoddinott* v. *Newton, Chambers & Co.* (1) was based; I think, therefore, that we are not incumbered to-day by the decision in *Wood* v. *Walsh.* (2) In my opinion, therefore, a ladder might be—at any rate I cannot say that it could not be—a scaffolding; and it would make no difference whether it were high above ground on the roof of a house or whether it were resting on the ground. I regret that it should be necessary to go into these subtleties at all, but I think it would be carrying refinement too far if I refused to consider the arrangement in question as capable of being "scaffolding" within the meaning of this Act.

STIRLING L.J. I regret that I am unable to agree with the judgment of the Master of the Rolls, and it is right that I should explain the reasons for my dissent. No doubt it is difficult to give effect to the interpretation of this section which was laid down in *Hoddinott* v. *Newton, Chambers & Co.* (1) The first question which arises is, What is the duty of the Court when a question of this kind arises? To this I think a plain answer is given in the judgments of Lord Macnaghten and Lord Brampton. Lord Macnaghten says (3): "I ought perhaps to add that I agree with my noble and learned friend Lord Brampton and with Collins L.J. in thinking that the question whether a temporary staging is a scaffolding within the meaning of the Act is not a mere question of fact on which the finding of the county court judge is final. It is a mixed question of fact and law. When the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and I think bound, to express an opinion." The same point is dealt with a little more in detail by Lord Brampton, who says (4): "I thoroughly agree that the arbitrator or county

(1) [1901] A. C. 49.
(2) [1899] 1 Q. B. 1009.
(3) [1901] A. C. at p. 56.
(4) [1901] A. C. at p. 68.

court judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not 'scaffolding' within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, &c.; and his finding upon such facts is, according to the general rule, final; but whether, upon the facts so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of s. 7 is, in my opinion, a question of law, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment on the question of law being open to review by the Court of Appeal." It is, therefore, not enough to say in the present case that the county court judge has found as a fact that this arrangement was a scaffolding; his determination, according to the decision of the House of Lords, is open to review here, and this Court is bound to say, looking at all the facts of the case, whether the structure is sufficient to satisfy the language of the statute—whether it is a scaffolding within the meaning of s. 7.

Then I pass to the question whether this particular structure was a scaffolding within the meaning of that section, and in considering this point I must again refer to the opinions expressed in the House of Lords. Lord Macnaghten says (1): "I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the Court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be." Then Lord Brampton (2) cited with approval the following passage from the judgment of Rigby L.J. in *Maude* v. *Brook* (3): "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to

(1) [1901] A. C. at p. 57. (2) [1901] A. C. at p. 69.
(3) [1900] 1 Q. B. 575.

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Stirling L.J.

that which is its most usual form: anything, whether usual or unusual, that can properly be called scaffolding is within the Act"; and Lord Lindley says (1): "What is meant by a scaffolding? Is any scaffolding meant? Is there any difference material to the present question between a scaffolding and a scaffold? My Lords, there is nothing in the Act which requires the scaffolding to be of any particular description or dimensions, or to be in any particular place or of any particular height. I cannot help thinking that to make any distinction between one scaffolding and another, or between a scaffolding and a scaffold, would be to introduce a subtlety not required by the Act, and one far too fine for practical work. In my opinion, anything which can fairly be called a scaffold is a scaffolding within the meaning of s. 7 if used as mentioned in the Act." The question, therefore, to which this Court has now to address itself is whether this particular structure can be properly or fairly called a scaffolding. Looking at the description given of the crawling-board in the applicant's evidence, I do not think that it can fairly be so called; it seems rather to be a form of ladder; in fact, ladders are frequently used for the same or similar purposes. And it must not be forgotten that the structure had not been put in position when the accident happened, but was only partly placed on the roof and was being raised by the men. But suppose it had been hooked on to the ridge of the roof, the only arrangement that we should have got would be two ladders not joined together, one of them on the ground and resting against the side of the house, and the other hooked on to the ridge of the roof and resting on the slating. Can they, whether taken singly or together, properly be described as scaffolding in the sense in which that word is ordinarily used? I admit that the word is difficult of definition, but, with the utmost respect for the views of the other members of the Court, this combination does not seem to me to be scaffolding within the meaning of s. 7. The appeal ought, in my opinion, to be allowed; but I do not regret the result, as the workman will get the compensation to which he is reasonably entitled.

(1) [1901] A. C. at p. 77.

MATHEW L.J. I agree with the Master of the Rolls. In my opinion, there was evidence to justify the conclusion at which the learned county court judge arrived; it was shewn that this crawling-board was a mechanical contrivance ordinarily used by workmen engaged in the repair of roofs, and it was while using this mechanical contrivance that the applicant met with the accident. If we turn to the language of the Act of Parliament, I agree that it gives rise to a difficulty which has been only partly dispelled by the many decisions in this Court and elsewhere. It was originally contended that where a workman was employed on a building which was being constructed or repaired by means of a scaffolding the ordinary meaning must be given to the word "scaffolding," and that, therefore, unless there was an elaborate system of poles and planks outside the building, the workman did not come within the protection of the Act. That view has not been upheld, and there is now no doubt that a mechanical contrivance used in a room inside a house might be a scaffolding within the meaning of the Act; for instance, a couple of trestles and a board across them may be scaffolding, and their use will bring within the Act any workman engaged upon the construction or repair of the house. Would there be any difference if, instead of the trestles, two chairs or any other means of support were used? I think not. In *Hoddinott* v. *Newton, Chambers & Co.* (1) another view was presented to the House of Lords, but that tribunal refused to place a definite meaning upon the word scaffolding; it was agreed that it was impossible to frame a definition which would be applicable to all building operations; but, as I gather from the judgment of Lord Brampton, a mechanical contrivance such as this suitable to the particular purpose of construction or repair would be scaffolding within the meaning of this Act. Indeed, it is very hard to understand why it should not be; it was obviously intended by the Legislature that workmen engaged in the construction or repair of a building exceeding 30 feet in height upon which building a scaffolding was in use should be protected by the Act, and I cannot see why a distinction should be drawn between the

(1) [1901] A. C. 49.

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use of scaffolding of the ordinary type and the use of an arrangement for the support of the workman while engaged in repairing the roof such as was employed in the present case; the Act is arbitrary, no doubt, but there is nothing to warrant the drawing of such an arbitrary distinction. Lord Brampton says (1): "I think the meaning of the Legislature was that from time to time, when work of construction or repair required the aid of a scaffold, any scaffold suitable for that particular purpose would be within the meaning of s. 7." It is to be noticed that Lord Brampton uses the words "*any* scaffold"; we may take it, therefore, that in his view scaffolding includes any structure or arrangement used as this was for the purpose of construction or repair of a house exceeding 30 feet in height. Lord Lindley, it is true, differed upon the question whether the work that was being done came within the words "construction or repair"; but upon this point he said: "I cannot say that boards on trestles, even inside a room, may not be a scaffolding, and still less can I say that the platforms in question in this case could not be so regarded if used as mentioned in the Act." With these expressions of the opinions of the learned Law Lords before me, I am of opinion that in the present case the learned county court judge was right. I do not think that the crawling-board was only a ladder, or that it could be properly described as being so; if it were, it would not seem to be a scaffolding, for this Court has already, in *Wood* v. *Walsh* (2), held that a ladder resting against a house is not. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for employer: *Cameron, Kemm & Co., for Miller, Derby.*

Solicitors for applicant: *Shaen, Roscoe, Massey & Co.*

(1) [1901] A. C. at p. 71. (2) [1899] 1 Q. B. 1009.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1902
Feb. 4.

FITZPATRICK *v.* EVANS & CO.

Employers' Liability Act—"*Workman*"—*Person employed in Coal Mine by Contractor*—*Contract by Workman with Mine-owner to obey Regulations*—*Liability of Mine-owner*—*Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58)—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.

The owners of a colliery entered into an agreement with a contractor by which the latter contracted to sink and wall a shaft in the colliery. One of the workmen employed upon the work by the contractor, and paid by him, was fatally injured by an explosion of gas in the mine. The deceased had, like all the other men employed by the contractor, signed the "record book" kept by the colliery owners, by which, in consideration of being employed in the mine, he became bound to observe the regulations and conditions laid down for the safety of the mine and for the guidance of the persons employed therein. The administrator of the deceased having brought an action against the colliery owners under the Employers' Liability Act, 1880, to recover damages for his death:—

Held, affirming the decision of a Divisional Court, that the signature of the conditions by the deceased did not create a contract of service between him and the colliery owners; that the deceased was not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the meaning of s. 10 of the Employers and Workmen Act, 1875; and that the Employers' Liability Act, 1880, did not therefore apply.

APPEAL from the judgment of a Divisional Court (Wills J. and Channell J.) allowing an appeal from the judgment of the deputy judge of the county court of Lancashire holden at St. Helen's. (1)

The action, which was tried with a jury, was brought under the Employers' Liability Act (1880) and the Fatal Accidents Act, 1846, to recover damages for the death of the plaintiff's son, who had been killed during sinking operations in a pit belonging to the defendants, who were proprietors of a colliery near St. Helen's. The defendants had entered into a contract with a man named Morris, a pit sinker, by which he agreed to sink and wall the shaft of a pit in the defendants' colliery.

(1) [1901] 1 K. B. 756.

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The deceased was employed by Morris upon the work as a "sinker" at wages of 6*s.* a day, which were paid by Morris. While working in the shaft, the deceased was so badly burned by an explosion of gas that he died.

It was admitted by the defendants that the deceased had signed the "record book" kept at their colliery of persons employed there upon the conditions mentioned in the book which were as follows :—

"Conditions of Employment at the Collieries and Works of Richard Evans & Co., Limited, the Haydock, Ashdon, Edge Green, Parr, and Golborne Collieries and Works, for all persons employed at the collieries and works directly or indirectly.

"The owners of the said collieries and works are hereinafter called the 'employer.' The said colliery and works are hereinafter called 'the colliery.'

"(1.) The persons directly employed at the colliery are engaged for an indefinite period, determinable upon fourteen days' notice. The employed undertake to work on each working day, Saturday included (if required), and the employer undertakes to employ them on such days, except in the event of accident, repairs, breakdown, or bad trade. The wages to be paid weekly.

"(2.) This contract shall remain in force and operate as a contract between the workman and the owner for the time being of the colliery so long as the workman continues to be employed at the colliery, notwithstanding any change in the members for the time being constituting the employer's firm.

"(3.) All usual and customary terms and regulations which obtain or exist with respect to the employment of workmen and all other persons employed in the colliery, whether expressed in writing or not, shall be and remain in full force and effect as part of the contract between the employer and the workman or other persons employed.

"*For Miners and Contractors only.*

"(4.) Every miner and contractor employed at the colliery shall, upon engaging any drawer, workman, or other person

to work under him, require such drawer, workman, or other person to obtain a copy of these conditions from the officer whose duty it is to provide such copies, and inform such drawer, workman, or other person that they are the conditions under which persons are employed at the colliery, and such miner, drawer, or workman, and other person respectively shall be bound by such conditions.

"*For Drawers and Persons working under Contractors only.*

"(5.) Every drawer employed by any miner, and every workman or other person employed by a contractor at the colliery, shall, at the request of such miner or contractor, obtain a copy of these conditions from the officer whose duty it is to provide such copies, and such drawer, workman, or other person shall in consideration of being employed at the works be bound, both as between himself and the miner or contractor and between himself and the owner, by the terms of these conditions."

At the trial Morris, who was called as a witness, said in his evidence that, if the manager of the mine had given him an order relating to the work he would have obeyed it, and would have expected his own workmen to do so.

The judge left to the jury the question (among others) whether the deceased was a workman in the employment of the defendants, which they answered in the affirmative. They also found that the defendants had been guilty of negligence, and assessed the damages at 50*l.*, for which amount the judge gave judgment.

The defendants gave notice of motion on appeal upon the grounds that the deceased was not a workman in the employment of the defendants within the meaning of s. 8 of the Employers' Liability Act, 1880, and s. 10 of the Employers and Workmen Act, 1875, and that, so far as it was a question of fact, there was no evidence to go to the jury that he was in the employment of the defendants.

The Divisional Court allowed the appeal.

Montague Lush, for the plaintiff. The true test, by which to determine whether the relation of employers and employed

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existed between the defendants and the deceased in a case like this, is to consider whether the defendants had the control of the workman. The questions, who paid his wages, and who had the right to dismiss him, are elements for consideration, but the ultimate test is, who had the control of him: *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Limited.* (1) The question is really one of fact, and the finding of the jury is conclusive, if there was any evidence for them. It cannot be said in this case that there was no evidence for the jury that the defendants were the employers of the deceased. The evidence of Morris was to the effect that the deceased was subject to the control of the manager of the mine. The effect of the signature of the "record book" by the deceased was to establish privity of contract between him and the colliery proprietors, and he thereby in effect contracted with them to obey the regulations prescribed and directions given for the conduct of the mine and operations therein. *Brown* v. *Butterley Coal Co.* (2) is an authority in favour of the plaintiff. The case of *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (3) is distinguishable on the ground pointed out by Rigby L.J. (4) There the regulations in force in the mine appear to have been imposed by statute, whereas in the present case the workman had contracted with the colliery proprietors by signing the "record book" to obey the regulations laid down. The defendants sought to obtain the right of controlling the workman without a corresponding responsibility towards him, which it is submitted they cannot do. [He also cited *Ruth* v. *Surrey Commercial Dock Co.* (5)]

Ruegg, K.C., and *S. H. Leonard*, for the defendants, were not called upon to argue.

COLLINS M.R. I think the judgment of the Divisional Court was right. In this case there is no doubt that the person who directly employed the deceased workman was an independent contractor. Therefore, in that respect the case is distinguish-

(1) [1893] 1 Q. B. 629.
(2) (1885) 53 L. T. 964.
(3) [1898] 2 Q. B. 588.
(4) [1898] 2 Q. B. pp. 603–4.
(5) (1891) 8 Times L. R. 116.

able from that of *Brown* v. *Butterley Coal Co.* (1), where the Court appear to have based their decision on the view that the butty man was not really a sub-contractor. In that case, rightly or wrongly, the Court inferred from the evidence that in point of fact the functions of the butty man were not those of an independent contractor, and therefore the men engaged by him were not in his employ, but in that of the company. In the present case we start with the facts that Morris was an independent contractor, and that the deceased workman was in his employ. In the rules laid down by the colliery owners for the guidance, both of those workmen who were directly employed by them, and of those indirectly employed, i.e., workmen in the employ of contractors working in the mine, we no doubt find provisions under which privity of contract is created between the colliery owners and the latter class of workmen, but that contract is of a limited character, and does not appear to me to suffice, or on the face of it to be intended, to turn the workman employed by a contractor into a workman employed by the colliery owners. It creates certain definite obligations on such a workman's part towards the colliery owners, but it does not create the direct relation of employer and employed between them. As Wills J. said in the Court below, the cases on this subject run very fine, and it is often difficult to draw the line in particular cases. It is, also, often difficult to prove a negative and to say that there is absolutely no evidence of the existence of the relation of employer and employed; but it is well settled, in dealing with such questions of fact, that there must be some reasonable amount of evidence to go to a jury, and that a mere scintilla of evidence is not enough. The plaintiff's counsel contended in effect that the fact that for certain purposes privity of contract was established between a workman engaged by a contractor and the colliery owners was of itself evidence with reference to the question whether the workman was in the employ of the colliery owners, and that, where that fact existed, it must be a question for the jury whether the relation of employer and employed existed between them or not. I cannot agree with

(1) 53 L. T. 964.

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that contention. It does not follow, because several factors taken together may constitute the relation of employer and employed, that, if one of those exists, there is evidence to go to the jury of the existence of that relation. It seems to me that the existence of the factor on which the plaintiff's counsel relied taken alone is equally consistent with either view of the case. I think that this case is really on all fours with the case of *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1) It was sought to distinguish that case on the ground that there the regulations in force in the mine were regulations imposed by statute, and not the subject-matter of contract; but it seems to me that, if, as would no doubt be the case, it was well known that such regulations were laid down, a workman, who came to work in the mine under them, would be taken to have come under an implied obligation as between himself and the colliery owners to be bound by them, or, in other words, to have contracted by implication to observe them, although he had not expressly contracted to do so. There appears to me therefore to be no substantial distinction between the case of *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1) and a case where, as in the present case, the workman signs a document which sets out the regulations to be observed in the mine. Each case must no doubt be decided on its own particular facts. It is a question of fact whether the relation of employer and employed had been established between the colliery owners and the deceased workman; but, as in the case of other questions of fact, there must be some reasonable evidence to go to the jury on the question. I think that in this case there was not any such evidence. I do not think that the evidence of Morris to the effect that, if the certificated manager of the mine had given him an order relating to the work, he would have obeyed it, and would have expected his own workmen to do so, constituted any evidence that the relation of employer and employed existed between these workmen and the colliery owners. For these reasons I think that the judgment of the Divisional Court was right, and should be affirmed.

(1) [1898] 2 Q. B. 588.

ROMER L.J. I also think that, for the reasons given by the Master of the Rolls and the learned judges in the Divisional Court, there was no evidence on which the jury were entitled to find that the deceased workman was in the employ of the defendants.

MATHEW L.J. I am of the same opinion. There was in this case evidence of a contract by the deceased workman with the defendants that he would obey the directions given by the defendants with regard to certain matters, but that is not conclusive of the question whether he was in their employment. On the other hand, there is no doubt that he was employed by an independent contractor named Morris, and that Morris could have dismissed him, or he might have dismissed himself, and the colliery owners would have had no ground of complaint. The question whether he was employed by the colliery owners is one of fact, and I find no evidence to go to the jury that he was so employed. It only shews how hard pressed the plaintiff's counsel was that he should have been obliged to rely on the evidence of Morris to the effect that, if the manager of the mine had given an order as to the work, he expected that his workmen would have obeyed it.

Appeal dismissed.

Solicitors for plaintiff: *Charles Russell & Co., for H. L. Riley, St. Helen's.*

Solicitors for defendants: *W. Norton Ellen, for Edwin Peace, Liverpool.*

E. L.

1901
Nov. 26, 27.

LORD MOSTYN *v.* FITZSIMMONS.

Landlord and Tenant—Lease—Renewal "at Costs of Lessee"—Costs of Reference and Award as to Amount of Fine payable on Renewal.

By a covenant for renewal in a lease for years the lessor covenanted at any time during the term, upon the request and "at the costs of the lessee," to renew the lease for a further term on payment of a fine calculated (in part) upon the full improved annual value of the premises at the time of renewal, such value to be determined by the landlord's surveyor or, at the option of the lessee, by the award of two referees or their umpire. The lessee having required a renewal of the lease, and the parties being unable to agree as to the amount of the fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, and the umpire made an award:—

Held, that the costs of the renewal which were to be paid by the lessee were the ordinary conveyancing costs only, such as the costs of drawing, settling, and completing the new lease, and that they did not include the costs of the reference and award, which were in the discretion of the umpire.

AWARD stated in the form of a special case under s. 7 of the Arbitration Act, 1889, from which the following facts appeared.

By a lease made in 1860 the Hon. Thomas Mostyn demised to Thomas Parry certain premises in Llandudno for seventy-five years from Christmas, 1860. By a lease made in 1863 Lady Henrietta Mostyn and others demised to Joseph Hughes certain other premises in Llandudno for seventy-five years from Christmas, 1860. Each lease contained a covenant for renewal in the following terms: "The lessors, their heirs or assigns, will at any time during the said term, upon request and at the costs of the lessee, his executors, administrators, or assigns, and on payment by him or them of a fine calculated according to the table hereunder written upon the number of years of the said term which have expired, and the full improved annual value of the said premises at the time of such renewal (such value to be determined by the said surveyor or at the option of the lessee by the award of two referees or their umpire),

renew or cause to be renewed the said term for the further term of seventy-five years from the date of such renewal at the like rent, and subject to the like covenants and conditions as are herein reserved and contained, including this present covenant for renewal." In the year 1900 T. H. Fitzsimmons (called throughout the award the lessee) claimed to be entitled to the premises comprised in both indentures of lease for the residue unexpired of the respective terms thereby granted, and Lord Mostyn (who was called the landlord) claimed to be entitled to the premises as landlord in reversion expectant on the determination of the terms of years, and in the meantime subject to the indentures of lease. The lessee having applied to the landlord for a renewal of the terms for a further term of seventy-five years from Christmas, 1900, differences arose between the parties as to the amount of the fines payable by the lessee to the landlord for or in respect of the renewal; the lessee thereupon gave notice of his desire to have the full improved annual value determined by the award of two referees, or of an umpire appointed by them as provided by the leases. The lessee and the landlord thereupon each appointed a referee, and the referees appointed an umpire. A question was raised before the umpire as to his power or discretion over the costs of the reference and award; and it was contended by the landlord that on the true construction of the leases the lessee was only entitled to obtain a renewal of the term at his own costs in all things, including the costs of both parties of and incidental to the reference and award, and that those costs had not been referred to the umpire to deal with, while the lessee contended that a costly reference extending over three days was not such a determination by two referees or their umpire as was contemplated by the leases, and, further, that in any event the costs of the reference and award were in the discretion of the umpire, who had power to deal with them under the Arbitration Act, 1889.

The questions for the opinion of the Court were, first, whether on the true construction of the leases the costs of renewal to be paid by the lessee included the costs of the reference and award; and, secondly, whether, whatever

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construction might be placed on the leases in relation to the costs of the reference and award, the umpire had any power or discretion to deal with those costs.

Montague Lush, (*Madden* with him), for the landlord. The lessee is liable to these costs. It is he who under the lease has to put the machinery in motion for obtaining a renewal, and the expression "at the costs of the lessee" means that he is to pay the whole of the costs of putting himself in a condition to claim a renewal of the lease; his liability cannot be confined to the cost of the actual deed of conveyance. This is not a mere valuation, but an arbitration under the statute: *In re Hopper* (1); consequently, as the costs are provided for in the submission, a "contrary intention" is expressed in it within the meaning of s. 2 of the Arbitration Act, 1889, and the arbitrator or umpire has no power over the costs under Sched. I. of that Act.

Marshall, K.C. (*E. P. Hewitt* with him), for the lessee. The costs for which the lessee is liable are the ordinary conveyancing costs incurred in the preparation and execution of the new lease. There are no authorities exactly in point as to what these costs would include, but in *Lock* v. *Furze* (2) counsel's and surveyor's fees were not allowed as part of the costs of a lease; and in *In re Gray* (3) the fees of a mining engineer were not allowed. There was no special bargain in the present case as to what the costs were to include, and, as the arbitration was in fact necessitated by the excessive demand of the landlord's surveyor, the costs of the ascertainment of the amount of the fine should not be put upon the lessee. In *Wortham* v. *Lord Dacre* (4) the costs of renewal were held not to include the costs of a suit to carry the contract into effect occasioned by the landlord having devised the property in strict settlement and died pending the arrangements for a renewal; the present is equally a case in which the costs have not been occasioned by any act of the lessee.

Montague Lush, in reply. The only question is, what were the costs in the contemplation of the parties. If the mode of

(1) (1867) L. R. 2 Q. B. 367.
(2) (1865) 19 C. B. (N.S.) 96.
(3) [1901] 1 Ch. 239.
(4) (1856) 2 K. & J. 437.

determining the sum is a necessary step, it is a part of the cost of the renewal and must be paid by the lessee.

WRIGHT J. This is not a very easy question to solve, but I have had an opportunity of considering it, and have come to the conclusion that the lessee cannot be called upon under this contract to bear the costs of the arbitration, unless directed to bear them by the referees or umpire. The question is whether the lease makes those costs part of the costs of the renewal. It seems to me that the natural meaning of the words "the lessor will upon the request and at the costs of the lessee" renew the term is that the lessee is to pay what I may call the ordinary conveyancing costs, such as drawing, settling, and completing the new lease; it is the renewing of the lease which is to be at the costs of the lessee. I cannot think that the meaning of those words, which would be plain enough if there were no provision for arbitration, is altered by the insertion of a provision for a possible arbitration at the option of the lessee. The question might be different if the lease had provided that the arbitration should take place in any event; but it does not so provide, and although if it did contain such a provision it might be more easily argued that the arbitration was part of the process of renewal, I do not think that as the matter stands it can be so regarded.

It would, I think, be unreasonable to hold that the lessor, if he chose to ask an unreasonable amount, could make the lessee bear all the expenses of ascertaining the correct amount. I do not for a moment say that the lessor or his surveyor did intend to ask, or did ask, an unreasonable amount; but it does appear that there was a sufficient margin between what they were inclined to ask and what was ultimately found to be the right value to make the event of the arbitration advantageous to the lessee. It would be going very far to hold that, if a lessor had been unreasonable, he could force on the lessee an expensive arbitration which would in many cases defeat an application for a renewal. I should rather gather that the intention was that if there were any costs they should be governed by the general law. If the lessee acts unreasonably

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Wright J.

in questioning the estimate of the landlord's surveyors, the lessor cannot under the present law be made to pay the costs of ascertaining the correct amount. I therefore answer the first question by declaring that on the true construction of the lease the costs of renewal to be paid by the lessee do not include the costs of the reference and award. With regard to the second question, I apprehend that it is not disputed (apart from the first question) that the umpire has power or discretion to deal with the costs; I think he has under the Arbitration Act, 1889.

Judgment for lessee.

Solicitors for landlord: *Hulberts, Hussey & Metcalfe.*

Solicitors for lessee: *Belfrage & Co., for Chamberlain & Johnson, Llandudno.*

W. J. B.

1901

Nov. 27.

BIGGAR *v.* ROCK LIFE ASSURANCE COMPANY.

Insurance—Accident—Principal and Agent—Misstatements in Proposal made by Agent of Insurers without Knowledge of Insured—Authority of Agent.

A policy of insurance against accidental injury was effected with an insurance company through their local agent. The proposal form was filled up by the agent, many of the answers filled in by him being false in material respects; the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal form without reading it. The proposal contained a declaration in which the applicant agreed that the statements in the proposal should form the basis of the policy, and the policy contained a proviso that it was granted on the express condition of the truthfulness of the statements in the proposal. Shortly after payment of the premium the insured was accidentally injured:—

Held, first, that it was the duty of the applicant to read the answers in the proposal before signing it, and that he must be taken to have read and adopted them; and, secondly, that in filling in the false answers in the proposal the agent was acting, not as the agent of the insurance company, but as the agent of the applicant; and that therefore the policy was void.

AWARD of an arbitrator stated in the form of a special case pursuant to s. 7 of the Arbitration Act, 1889. The arbitration was held in accordance with the conditions of a policy of

assurance against accidents issued by the Rock Life Assurance Company in favour of John Henry Biggar, the provisions of the Arbitration Act, 1889, being incorporated in the policy.

Biggar, a publican, claimed to be entitled to a sum of 500*l.*, which was alleged to be due as on permanent partial disablement by the accidental loss of an eye, under a policy against accidents issued in February, 1900. The claim was resisted on the ground that the written proposal, on the terms and conditions of which the policy was granted, contained false statements, and that the policy was procured by material misrepresentations of fact and concealment. The facts as to the effecting of the insurance were found by the arbitrator, and were as follows: A firm of F. Cooper & Sons, who were insurance agents, had been since 1887 local agents to the Rock Life Assurance Company, but had brought very little business to the company; they were also agents for (among other insurance companies) the Law Accident Company. Arthur Cooper, the junior partner, had previously, as agent for the Law Accident Company, effected an insurance for Biggar against injury by accident, and through Cooper a sum of about 6*l.* had been paid to Biggar in respect of a slight previous accident; an application through Cooper for an increase in the amount of Biggar's insurance had been declined by that company. Arthur Cooper had been personally well acquainted with Biggar for some years.

Biggar carried on the business of a publican at the Spinners' Arms, Bollington, and had recently been appointed traveller to a firm of tea merchants; and prior to February, 1900, Cooper had been trying to induce Biggar to take out a further policy with the Rock Company, holding out as an inducement to do so a reduction of 10 per cent. on the premium in consideration of Biggar being a teetotaler. On February 2, 1900, one Findlow, an inspector of agents for the Rock Life Assurance Company, called on Cooper and went with him to assist to secure Biggar's insurance for the company. They found Biggar in the billiard-room at the Spinners' Arms. Findlow was introduced to Biggar, and explained the standing and advantages of the Rock Company. After some games of billiards

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had been played, Findlow, Cooper, Biggar, and another began a game. These persons and the marker were called as witnesses before the arbitrator. As the game began Findlow said to Cooper, "This seems secured all right; you had better fill up the proposal." Cooper then went and sat at a side-table, produced a proposal form, and filled it up without further communication with Biggar. On this proposal form question No. 4 was: "Profession or occupation (state whether master—working, not working, or superintending only—or workman)." To this the answer inserted by Cooper was, "Tea traveller." Question No. 5 was: "Are you already insured against accidents? If so, state name of office and amount of policy." Answer: "No." Question No. 6: "Have you ever made a claim or received compensation for injuries or disease? If so, state from whom, and give dates and particulars." Answer: "No." Question No. 11: "Do you claim the 'special bonus' as a life policy-holder or a total abstainer?" Answer: "Yes; total abstainer all life." The proposal form, under the head "Other Particulars," also contained this: "No company has ever declined to assure me nor to renew my policy. I request the Rock Life Assurance Company to grant me a policy in accordance with the above particulars, and I agree that the above statements shall form the basis of the contract between me and the company." The arbitrator found that the answers made by Cooper to questions 5 and 6 were untrue in material respects, and that the answer to question 4 was only part of the truth, and that the omission was material. In fact, Biggar was already insured with the Law Accident Company, an increase had been applied for through Cooper and refused by them, a payment had been made in respect of a previous accident, and Biggar was a licensed victualler as well as a tea traveller.

The arbitrator was satisfied upon the evidence that Cooper did know the correct answers to all the questions; that he asked no questions of Biggar; that Biggar did not instruct or authorize Cooper to make any false answer, and did not know that Cooper had answered any question falsely. Cooper answered the questions as he did either through gross negli-

gence in the hurry of the game (which was the excuse given by him in his evidence), or fraudulently to prevent the proposed insurance being refused by the company and to secure his own commission.

As soon as Cooper had filled up the proposal he called to Biggar to come over from the table where he was playing and sign, saying, "Now, John, it's your turn now." The arbitrator found that Biggar did sign the proposal without reading it and without knowing or considering whether what Cooper had put down was truthfully stated or not, but without reason to believe or suspect, or in fact believing or suspecting, that any of the statements were untrue. Cooper knowingly permitted him to sign in the way he did without calling his attention to the questions or to the answers. Findlow took no part in filling up the proposal, and was not aware that Cooper had inserted any false answers, but he was aware that Cooper was filling it up without assistance from Biggar. When signed, Findlow read the proposal and inquired as to Biggar's private and business residence, which was given as the Spinners' Arms. He was told by Cooper that the public-house belonged to Biggar's wife, and he believed the statement. The proposal was taken away by Cooper, and through him Biggar was informed that the company accepted the insurance, and the premium was paid to Cooper and the policy issued. On February 21, 1900, by the accidental bursting of a bottle of aerated water while carrying on his business of a publican, Biggar lost the sight of one eye, sustaining permanent partial disablement within the policy.

If in the opinion of the Court the false statements contained in the proposal afforded, upon the facts stated, no defence in law to the company, then the award was that the company do pay to the claimant the sum of 500*l.*, and do bear their own costs and do pay the claimant's costs of the arbitration and do pay the costs of the award.

If in the opinion of the Court the false statements contained in the proposal did, upon the facts stated, afford a defence to the company upon a claim under the policy, then the award was that nothing was due to the claimant, and that he do bear

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his own costs and pay the respondents' costs of the arbitration and award.

The sum assured by the policy was 1000*l.* at death, 500*l.* on loss of one limb or one eye, and other sums according to the circumstances. The policy recited that "whereas John Henry Biggar, of Spinners' Arms Hotel . . . . by occupation tea traveller, hath made a proposal for insurance against accidents dated February 2, 1900, and has paid to the Rock Life Assurance Company the sum of 3*l.* 12*s.*" (being the premium of 4*l.* less 10 per cent. for total abstinence) "as the first premium for the following assurance from February 2, 1900, to February 1, 1901, both dates inclusive."

The policy contained the following proviso: "Provided always, that these presents are granted on the express condition of the truthfulness of the statements contained in the proposal and the declaration thereto, and it is declared that misrepresentation or concealment by, or on the part of, the assured, either as to the obtaining of this policy, or in regard to any claim for compensation hereunder, shall nullify these presents and render this policy void and of no effect, and thereupon all premiums paid under this policy shall be forfeited to the company; and it is further declared that this policy shall be void and of no effect in the event of the assured either changing his occupation so as in the opinion of the directors to increase the risk, or going beyond the limits of Europe, or embarking in any vessel with the intention of going beyond such limits; and in these cases all premiums shall be forfeited to the company, and no claim will be sustainable under this policy: Provided further . . . . that this policy and the assurance thereby effected are and shall be at all times and under all circumstances subject and liable to the several conditions, restrictions, and stipulations printed or written at the back of this policy, in the same manner as if the same respectively were repeated and incorporated in this policy."

No. 12 of the conditions on the back of the policy was as follows: "Any of the circumstances in relation to these conditions coming to the knowledge of any local agent shall not be notice to or be held to bind or prejudicially affect the

company, notwithstanding the subsequent acceptance of any payment or other payment by them, nor will the company be bound by any receipt except it be on the printed office form for the time being of the company." Condition 9 provided, "if any difference of any kind whatsoever shall arise between the company and the assured in respect of this policy or any claim thereunder, the same shall be referred to arbitration under the provisions of the Arbitration Act, 1889, or any Act or Acts amending the same."

Ernest Pollock, for the claimant. The claimant is not barred from recovering the amount insured by reason of the 12th condition on the back of the policy, which applies only to the other conditions, and has no effect upon the proviso contained in the body of the policy; it has no application where the difficulty has been created by reason of the misrepresentations and fraud of the company's own agent. The knowledge of the agent as to the incorrectness of the answers in the proposal form, coupled with the ignorance of the claimant that false answers had been inserted, bring the case within the principle of the decision in *Bawden* v. *London, Edinburgh and Glasgow Insurance Co.* (1), and the knowledge of the agent must be treated as the knowledge of the company; it must be taken that with knowledge of the falsity of the proposal the company nevertheless issued the policy. In *Wing* v. *Harvey* (2) Knight Bruce and Turner L.JJ. held that the knowledge of a local agent was constructive notice to the society of a breach committed by the assured in going beyond the limits of Europe, and that acceptance of premiums by the agent after knowledge of the breach precluded the society from insisting on the forfeiture. That decision is an authority for the proposition that, although the agent of the company may travel outside his apparent authority, he may nevertheless bind the company. An insured is not liable for misdescription by the company's agent of buildings intended to be insured: *In re Universal Non-Tariff Fire Insurance Co.* (3); and it is immaterial that in

(1) [1892] 2 Q. B. 534. (2) (1854) 5 D. M. & G. 265.
(3) (1875) L. R. 19 Eq. 485.

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making the misstatements the agent was acting negligently or fraudulently towards the company, his employers.

Pickford, K.C. (*C. Herbert-Smith* with him), for the company. The claimant is not entitled to recover. Cooper's knowledge of the falsity of the statements in the proposal form had not been obtained as the agent of this company, but as agent for the Law Accident Company. He had no authority to answer the questions in the proposal form, and in doing so he was not acting as the agent of the company, but as the agent of the claimant. The decision in *Bawden* v. *London, Edinburgh and Glasgow Insurance Co.* (1) was considered in *Levy* v. *Scottish Employers' Insurance Co.* (2), where Wills and Phillimore JJ. pointed out that it turned upon the special terms of the contract, and that it only decided that under the circumstances the agent was the agent of the company to settle the terms of the proposal. There is no English case precisely in point, but the American case of *New York Life Insurance Co.* v. *Fletcher* (3) is very similar. In that case correct answers were given to the agent, who wrote them down incorrectly, and the proposal was then signed by the assured without reading it; the policy was held to be void, and it was held to be the duty of the assured to read the answers before signing them. Here the claimant not only signed the proposal without reading the answers, but he signed the declaration by which he agreed to be bound by the statements, with which declaration the agent had nothing to do.

Ernest Pollock, in reply.

WRIGHT J. In this case Biggar, who was a publican, seems to have been canvassed by the insurance company's agents, who in February induced him to send in a proposal for insurance against accidents. The ordinary course would have been for the applicant to fill in the answers to the questions in the proposal form; but in the present case Cooper, the company's agent, filled up the proposal form without consulting Biggar as to the answers to be given, and then invited Biggar to sign the

(1) [1892] 2 Q. B. 534. (2) (1901) 17 Times L. R. 229.
(3) (1886) 117 U. S: 519.

form so filled up, which Biggar did without reading it. The proposal form so signed contained not only the questions, with the answers inserted by the agent, but also a declaration at the foot to which Biggar himself signed his name, and which stated (inter alia) that "no company has ever declined to assure me nor to renew my policy," and also that he requested the company to grant "a policy in accordance with the above particulars"; by the declaration Biggar further agreed that "the above statements shall form the basis of the contract." The answers inserted by Cooper, the agent, were false in many material particulars; but Biggar was not aware of their falsity, and apparently was not aware of what the answers were in fact or of what were the questions to which they were the answers. This false proposal form was afterwards transmitted to the company by Cooper and the proposal was accepted; the premium was then paid by Biggar through Cooper and the policy was issued. Some little time afterwards Biggar met with an accident, and the question now is whether he is entitled to recover on the policy.

It is plain that the policy is primâ facie avoided, for some of the particulars and statements in the answers, the correctness of which was a condition precedent to the validity of the policy, were false; Biggar, therefore, cannot recover unless he is able to shew that the insurance company is prevented from setting up that ground of avoidance by reason of its agent, Cooper, having acted in fraud of his principals. I will deal with a minor point first. It is said that in any case (whatever may be the proper decision as to the main question here) the claimant is disentitled to recover, because he signed a paper containing certain other particulars, and especially the statement that no company had ever declined to assure him or to renew his policy. I am inclined to think that that is of itself sufficient to prevent him from having any claim against the company; but I do not wish to rest my decision upon that, because I do not think the case was stated with reference to that particular contention, and I do not think it is so explicit with regard to it as I could have wished. I do not feel quite clear that this representation which he signed is sufficiently

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untrue, and I prefer to deal with the case upon the main point.

As to that, I agree with the principles which were laid down by the Supreme Court of the United States in *New York Life Insurance Co.* v. *Fletcher* (1), decided in 1885, in which the judgment of the whole Court was delivered by Field J. It seems to me that that case is very much in point, although in some respects it is different from the present case: in some respects it is weaker, and in some respects stronger. I agree with the view taken by the Supreme Court in that case, and apparently in other cases there cited, that if a person in the position of the claimant chooses to sign without reading it a proposal form which somebody else filled in, and if he acquiesces in that being sent in as signed by him without taking the trouble to read it, he must be treated as having adopted it. Business could not be carried on if that were not the law. On that ground I think the claimant is in a great difficulty. But, further, it seems to me that here, as in the case of *New York Life Insurance Co.* v. *Fletcher* (1), it would be wrong to treat Cooper, the company's agent, as their agent to suggest the answers which Biggar was to give to the questions in the proposal. Cooper was an agent to receive proposals for the company. He may have been an agent, as Lindley and Kay L.JJ. put it in *Bawden* v. *London, Edinburgh and Glasgow Insurance Co.* (2), to put the answers in form; but I cannot imagine that the agent of the insurance company can be treated as their agent to invent the answers to the questions in the proposal form. For that purpose, it seems to me, if he is allowed by the proposer to invent the answers and to send them in as the answers of the proposer, that the agent is the agent, not of the insurance company, but of the proposer. I cannot put the doctrine better than in the language of the Supreme Court in *New York Life Insurance Co.* v. *Fletcher* (1), at pp. 532–533 of the case referred to, where they are citing from and adopting previous decisions of the Supreme Court. They say (speaking of another case): "The application was signed without being read. It was held that the company was

(1) 117 U. S. 519.

(2) [1892] 2 Q. B. 534.

not bound by the policy; that the power of the agent would not be extended to an act done by him in fraud of the company and for the benefit of the insured, especially where it was in the power of the assured by reasonable diligence to defeat the fraudulent intent; that the signing of the application without reading it or hearing it read was inexcusable negligence; and that a party is bound to know what he signs." Then, speaking of the agent's conduct, they say: "His conduct in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself or third persons and against his principal, there is no agency in respect to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal . . . . The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential." Then they go on: "She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only in good faith answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud, and the insurer has not."

That doctrine of the Supreme Court of the United States seems to me to be good sense and good law. Even if those doctrines are not to be applied to their full extent, still I cannot conceive how this policy can be held to be binding on the company. The very basis of the policy is the statements in the proposal. These statements are false in several material respects. How, then, can the policy be binding on the company? If the plaintiff is entitled to anything, I think that the

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most he could ask for would be that the Court should say that the contract is void on the ground of either fraud or mistake, with the consequence, perhaps, that he may be entitled to recover back the premium that he paid; but I cannot see how it can be held under these circumstances that the company is bound by the policy. I see no equity against the company in this case—no equity, for instance, such as might exist on the ground of receipt of premium with knowledge of the falsity of the statements. They never knew of the falsity of the statements, and they never knew that the proposal form had been filled in with answers invented by the person purporting to act as their agent. I think the answer to the question asked by the learned arbitrator must be that the facts stated shew a defence in law.

Judgment for the company.

Solicitors for claimant: *Sharpe, Parker, Pritchards, Barham & Lawford, for Sheldon, Plant & Barclay, Macclesfield.*

Solicitors for respondents: *Kendall, Price & Francis.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1902
Jan. 22.

YATES *v.* TERRY.

Practice—Garnishee Summons—Attachment of Debt—Payment into Court of Amount in Garnishee Order—Balance in Hands of Garnishee—Assignment—Effect of Notice of Assignment.

Money in the hands of the defendant was attached under a garnishee order to satisfy a judgment debt. The judgment debtor assigned to the plaintiff the balance of the amount in the hands of the defendant, and notice was given of the assignment. Subsequently a garnishee order was served on the defendant with respect to another judgment debt. The defendant thereupon paid the amount of the first judgment debt into court, and the balance of the money in his hands he paid into court under the second garnishee order. In an action by the plaintiff to recover the amount of the balance:—

Held, that, when the first garnishee order had been satisfied by payment into court, the assignment took effect as to the balance in the hands of the defendant, that the money should have been paid to the plaintiff, and that he was entitled to recover the amount.

Judgment of the Divisional Court, [1901] 1 K. B. 102, reversed.

APPEAL from a judgment of the Queen's Bench Division (Lawrance and Kennedy JJ.) reported [1901] 1 K. B. 102, on an appeal from the decision of the deputy judge of the Liverpool County Court.

The defendant was the receiver and manager of the Wirral and Wallasey Cycle Company, Limited, which was in liquidation. On February 20, 1900, an order was made upon him by the Court to pay to one William Henderson, for salary and services, the sum of 50*l.* 1*s.* 6*d.* On February 21 a garnishee summons was served upon him in a county court action, in which judgment had been recovered against Henderson for the sum of 37*l.* 18*s.* 4*d.* The garnishee summons followed the ordinary county court form, and called upon the garnishee "to shew cause why an order should not be made upon you for the payment of the amount of the said judgment, or so much thereof as shall equal the amount of the debts due and accruing from you to the said William Henderson. And take notice

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that, from and after the service of the summons upon you, all such debts are attached to answer the said judgment, and that if you shall pay the said debts to the said William Henderson, or otherwise dispose of them, you will be liable to be committed for contempt."

On February 27, 1900, Henderson assigned to the plaintiff the sum of 16*l.* 17*s.* 8*d.* due to him from the defendant, and on February 28 the plaintiff gave to the defendant due notice of this assignment.

On March 15, 1900, a second garnishee summons was served upon the defendant in a county court action, in which judgment had been recovered against Henderson for the sum of 21*l.* 4*s.* 7*d.* The defendant thereupon paid into court under the first garnishee summons the sum of 37*l.* 18*s.* 4*d.*, and under the second garnishee summons the sum of 12*l.* 3*s.* 2*d.*, being the balance of the sum of 50*l.* 1*s.* 6*d.*

This action was brought to recover the sum of 12*l.* 3*s.* 2*d.*, on the ground that the payment under the second garnishee summons after notice of the assignment to the plaintiff was wrong. The deputy county court judge gave judgment for the plaintiff.

The defendant appealed, and the appeal was allowed by the Divisional Court. (1)

The plaintiff appealed.

Whitty, for the plaintiff. The point raised before the county court judge on behalf of the defendant was that the assignment to the plaintiff was ineffectual because of the prior attachment. It is misleading to say merely that the defendant paid the whole amount in his hands into court, because that leaves out of consideration the fact that he paid it in in two separate proceedings. Under Order XXVI. A, r. 5, of the County Court Rules, 1889, he paid in under the first garnishee order "an amount equal to the judgment" that had been obtained. Before he did so he was under no obligation to deal with the balance in his hands: *Rogers* v. *Whiteley* (2); but payment of the first debt freed the balance in his hands, and the plaintiff

(1) [1901] 1 K. B. 102. (2) [1892] A. C. 118.

was entitled to it under the assignment, which was prior in point of time to the second garnishee order. The defendant might have proceeded if there was any doubt as to who was entitled to the balance under rule 11 of the order; but he chose to pass over the assignment to the plaintiff, and to pay the money over under the second garnishee order, and he is therefore liable in this action: *Wood* v. *Dunn.* (1)

Cuthbert Smith, for the defendant. The decision of the House of Lords in *Rogers* v. *Whiteley* (2) shews that when this assignment was made there was no chose in action, because the plaintiff could not have sued the defendant. The assignment did not operate until the first garnishee order had been satisfied by payment into court, and by that time the balance in the hands of the defendant was attached under the second order.

COLLINS M.R. This is an appeal by the plaintiff against the result of proceedings which were commenced by him in the county court. He obtained judgment, but on appeal to the Divisional Court the decision in his favour was reversed and judgment given for the defendant. He sued as the assignee of a debt due from the defendant to one Henderson, and he gave notice of the assignment to the defendant. Prior to the giving of that notice a garnishee order had been served on the defendant attaching all debts due from him to Henderson, to answer the judgment that had been obtained in the county court against Henderson. After the assignment and notice a second garnishee order was served on the defendant, in respect of another judgment obtained against Henderson in the same county court. Under these circumstances, what the defendant did, with regard to the fund in his hand, was to appropriate a sufficient sum to meet the judgment on which the first garnishee order was founded, and this sum he paid into court. He appropriated the balance in his hands towards satisfaction of the judgment on which the second garnishee order was founded, and he paid it into court in the action in which that judgment was obtained. That was an appropriation which

(1) (1866) L. R. 2 Q. B. 73. (2) [1892] A. C. 118.

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entirely ignored the intervening rights of the plaintiff as assignee. The county court judge held, on another ground than that argued before us, that the plaintiff was entitled to recover; and it certainly seems to me that he was. It was contended in answer to the plaintiff's claim that the effect of the first garnishee summons was to attach in the defendant's hands the whole of the debt due from him to Henderson, and not merely so much as was sufficient to satisfy the judgment debt, and it was said that while the attachment subsisted it would have been wrong to appropriate any part of the fund to any other purpose, and that therefore the assignment could not take effect. This argument is not applicable to the facts of this case, for the defendant freed himself, so far as the balance of the money was concerned, from liability under the first attachment by the payment into court. He was affected with notice of the assignment to the plaintiff, and held the balance of the money for the assignee, and, as that exhausted the fund in his hands, he was under no liability under the second garnishee order. He remained under liability to pay the money to the plaintiff, and cannot raise the defence that he has paid it away elsewhere, because he did not pay it under any exigency but of his own motion.

I am therefore of opinion that the appeal should be allowed, and the judgment of the county court judge in favour of the plaintiff restored.

ROMER L.J. I agree. Where a debtor has been served with a garnishee order covering an amount less than the amount in his hands, no doubt he cannot be compelled to make any payment out of the money in his hands to any one else so long as the attachment is in force. At the same time, it must be remembered that garnishee proceedings are for the purpose of enabling a judgment creditor of the person to whom the debt which is garnished is due to realize his judgment. The person in whose hands the debt is garnished holds it subject to the right of the judgment creditor, and has himself no right to the balance after satisfaction of the judgment. That right to the balance still remains in the person who originally had

the right to the whole, and it is capable of assignment. Such a right was assigned in this case, and the assignment completed by notice; so that everything was done to make the assignment effective as to the debt in the hands of the defendant, subject to the right of the judgment creditor under the first garnishee order. In the result there was a balance left in the hands of the defendant bound by the assignment, and it was his duty not to let the subsequent garnishee order pass without notice that the fund was not really that of the judgment debtor, so that it could be attached, but that of an assignee. By breach of that obligation the assignee has lost his money, and according to well-known principles the defendant is liable for that loss.

MATHEW L.J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Field, Roscoe & Co., for Yates & Co., Liverpool.*

Solicitors for defendant: *Sharpe, Parker & Co., for Bielby & Welby, Liverpool.*

A. M.

C. A.
1902
Feb. 3.

[IN THE COURT OF APPEAL.]

KEATES *v.* WOODWARD.

Practice—Costs—Trespass—Claim for Damages and Injunction—Judgment for Nominal Damages and Injunction—"Action founded on Tort"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116, *sub-s.* 2.

An action, claiming damages for trespass to land and an injunction, was transferred under s. 69 of the County Courts Act, 1888, from the Chancery Division of the High Court to a county court. The action resulted in a verdict for the defendant, for whom judgment was entered. On appeal a Divisional Court directed that judgment should be entered for the plaintiff for nominal damages and an injunction, but without costs, on the ground that the plaintiff had recovered less than 10*l.* in an action founded on tort, and was disentitled, under s. 116, sub-s. 2, of the Act, to the costs of the action. On appeal:—

Held, that an action which, though nominally brought to recover damages for a tort, includes a claim for an injunction as the main part of the relief sought, is not an action founded on tort within the sub-section, and that the plaintiff was entitled to the costs of the action.

St. John's College, Cambridge v. *Pierrepont*, (1891) 61 L. J. (Q.B.) 19, overruled.

APPEAL from the judgment of a Divisional Court (Wills and Channell JJ.) on an appeal from a county court.

The action was commenced in the Chancery Division of the High Court, and the plaintiff claimed damages for a trespass to land and an injunction. The action was transferred to a county court under s. 69 of the County Courts Act, 1888. The defence raised was that the defendant had a right of way over the land. The case was tried with a jury, who found that the right of way had been established, and judgment was given for the defendant. On appeal, the Divisional Court held that there was no evidence of a right of way, and that the plaintiff was entitled to nominal damages for the trespass, and to an injunction. The appeal was therefore allowed with costs. The plaintiff applied for the costs of the action, but the application was refused on the authority of *St. John's College, Cambridge* v. *Pierrepont*. (1)

The plaintiff appealed.

(1) 61 L. J. (Q.B.) 19.

F. E. Smith, for the plaintiff. It is submitted that the decision in *St. John's College, Cambridge* v. *Pierrepont* (1) was wrong. There are two reasons why this case does not come within s. 116. It is not an action founded on tort, for the principal relief sought was an injunction, and it is really equivalent to an action for a declaration of right, as shewn by *Chapman* v. *Midland Railway* (2), which dealt with the old practice as to different scales of costs. Sect. 116 only applies where the gist and substance of the claim is the recovery of damages for a tort. In the next place the plaintiff has obtained, in addition to the recovery of nominal damages, an order for the injunction that he asked for, and that fact takes the case out of the section which was intended to hit trivial actions brought in the High Court. *Danby* v. *Lamb* (3), which does not appear to have been cited in *St. John's College, Cambridge* v. *Pierrepont* (1), is an authority in favour of the plaintiff, and so is the decision of the Queen's Bench Division in Ireland in *Bradley* v. *Archibald* (4), in accordance, as appears by the judgment, with a decision of the Court of Appeal in Ireland, that the section does not apply to an action of detinue in which goods are recovered in specie, or to an action in which an injunction is claimed.

Shearman, for the defendant. There is no power to give costs to the plaintiff. The judge of the county court cannot do so because the action was not commenced there, and the High Court cannot because the action has been transferred. The only action within the jurisdiction of the county court is on a claim for damages, and the granting of an injunction is merely ancillary relief: *Martin* v. *Bannister*. (5) The claim for an injunction would not be in itself a cause of action, and such a claim standing alone could not have been brought in the county court. Orders for injunctions, receivers, committal, and so on are mere remedies, and the test applied by s. 116 is a monetary one which does not deal with such matters. The decision in *St. John's College, Cambridge* v. *Pierrepont* (1) is in

(1) 61 L. J. (Q.B.) 19.
(2) (1880) 49 L. J. (Q.B.) 449.
(3) (1861) 11 C. B. (N.S.) 423.
(4) [1899] 2 I. R. 108.
(5) (1879) 4 Q. B. D. 491.

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point and should be upheld. An action of detinue stands on a different footing from an ordinary action of tort. The matter might be dealt with by legislation which gave a county court judge power to certify, but as the law stands it is submitted that the plaintiff cannot recover the costs.

F. E. Smith, in reply.

COLLINS M.R. In this case an action was commenced in the Chancery Division of the High Court in which damages for a trespass to land were claimed, and also an injunction against a repetition of the trespass. The case was transferred to the county court, and the jury found that the claim to a right of way set up by the defendant was well founded. There was an appeal to the Divisional Court, and the judgment given in the county court was reversed on the ground that there was no evidence of a right of way, and the plaintiff obtained nominal damages and an order for an injunction. We are entitled to deal with the case as if the judgment in the county court had been that which the Divisional Court decided it should have been, namely, judgment for nominal damages for the trespass and an injunction.

It was contended in the Divisional Court that the plaintiff was entitled to the costs of the action; but the learned judges considered themselves bound by the decision in the case of *St. John's College, Cambridge* v. *Pierrepont* (1), and held that the plaintiff was not entitled to costs. The head-note in that case is as follows: "In an action of trespass, where the main issue to be determined was one of title to land, the plaintiff claimed an injunction and damages. The action was tried before a judge with a jury. The jury found a verdict for the plaintiffs with 40*s*. damages. The judge gave judgment for the plaintiffs and granted an injunction, but made no order as to costs:—*Held*, that the plaintiffs were not entitled to costs." That decision deals with the point raised in this case, and it is relied on as shewing that s. 116, sub-s. 2, of the County Courts Act, 1888, is applicable to the case before us. No doubt this action could have been commenced in the county court, and it is said

(1) 61 L. J. (Q.B.) 19.

that, the action being founded on tort and less than 10*l.* having been recovered, the plaintiff is not entitled to costs. If that were the true view of the case, it would be a conclusive answer to the plaintiff's claim for costs, because he cannot come before a judge of the High Court and ask for a certificate under the latter part of the section.

The question, therefore, is whether this action, in which not only nominal damages have been obtained, but, what was much more important to the plaintiff, an injunction, comes within the fair meaning of the words "action founded on tort," in which less than 10*l.* has been recovered, as used in the section. I think that it could not have been the intention of the Legislature that, where the main point of the litigation is a claim for an injunction and the subsidiary point a claim for damages, the action should be considered as coming within the meaning of the section. Could it be said that less than 10*l.* has been recovered when, in addition to nominal damages, a right worth a thousand pounds has been secured? Going back to the state of things that existed before the Act of 1888, the decision of the Court of Common Pleas in *Danby* v. *Lamb* (1) on s. 34 of the Common Law Procedure Act, 1860, supports this view. That was an action of detinue, and by s. 34 of the Act it was enacted that when the plaintiff in any action for an alleged wrong in any of the Superior Courts recovers by the verdict of a jury less than 5*l.* he should not be entitled to recover costs if the judge or presiding officer certified that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought. The question was whether the action was in substance for an alleged wrong in respect of which less than 5*l.* had been recovered. Erle C.J., before whom the case was tried, certified to deprive the plaintiff of costs, and the matter came before a Court of which he was a member. In his judgment he said: "A party who wilfully detains the goods of another, in some sense commits a wrong: and, although the

(1) 11 C. B. (N.S.) 423.

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action of detinue has always been classed amongst actions ex contractû, I should have thought the power to certify was extended to that form of action, were it not that the whole purview of the section seems to be directed to the case where damages alone are sought to be recovered by way of compensation for a wrong . . . . Here, by the Common Law Procedure Act, 1854, s. 78, the plaintiff may have judgment to recover the chattel itself. I cannot therefore say that this is an action brought merely to recover damages for the wrong." Williams J. expressed the same view in similar language. Byles J., it is true, rested his judgment on another ground, namely, that detinue was an action of contract, a view which has been since displaced by the decision of the Court of Appeal in *Bryant* v. *Herbert*. (1) No doubt there are special words in the Common Law Procedure Act which do not appear in the section we are discussing, but both are obviously aimed at actions for torts in which small damages and nothing more are recovered. The decision of the Court of Common Pleas has been followed by the Court of Appeal in Ireland. In *Bradley* v. *Archibald* (2), in the Queen's Bench Division, Palles C.B deals with the point in his judgment, in which he says: "The words of the rules that correspond to s. 243 of the Common Law Procedure Act of 1853, and s. 97 of the Common Law Procedure Act of 1856, are very peculiar. They say that where the plaintiff shall recover a sum less than 20*l*. in contract, or a sum not exceeding 5*l*. in tort, he shall, under certain circumstances, be deprived of costs, or be entitled to half costs only. Thus the subject-matter of these rules, and of the sections of the Acts of 1853 and 1856, plainly is a judgment that deals with a sum of money, and a sum of money only. In my opinion, these provisions have no application to a case in which the proper relief would be relief by way of injunction," and he states that the question had been before the Court of Appeal, who had agreed that if the case was one in which an injunction could be granted those provisions would not apply. The other learned judges concurred in this judgment.

(1) (1878) 3 C. P. D. 389.

(2) [1899] 2 I. R. 108.

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There is the case of *St. John's College, Cambridge* v. *Pierrepont* (1), to which I have already referred, in which the opposite view has been taken; but it is remarkable that the earlier case of *Danby* v. *Lamb* (2) does not appear to have been cited, and I cannot say what the opinion of the Court would have been had that case been brought to their attention. It seems to me that there is a preponderating authority for the view that I have indicated—that the fair meaning of the words "action founded on tort" in s. 116, sub-s. 2, is that a tort should be the gist of the action, and that the section is not applicable to an action which, though nominally to recover damages for a tort, includes, as the main relief sought, a claim for an injunction. The real basis of this action was the claim of a right in respect of which an injunction was sought, and the case was, in my opinion, outside s. 116, sub-s. 2, and the plaintiff is entitled to his costs. The appeal, therefore, should be allowed, and the judgment of the Divisional Court varied so far as it deals with the costs of the action.

ROMER L.J. I am of the same opinion. Sub-s. 2 of s. 116, which deals with the case of an action founded on tort in which less than 10*l.* is recovered, is primarily directed to actions for pecuniary damages for a tort. I wish to guard myself against being understood to say that a plaintiff who is substantially seeking damages can take the case out of the section by adding a colourable claim for an injunction. But when there is, besides the pecuniary claim, a substantial claim for relief of another kind, it seems to me that the section is inapplicable. To hold otherwise would produce extraordinary results. For example, take the case of a contract to pay a sum of 15*l.* in cash and to hand over certain chattels of the value of 20*l.* An action is brought to enforce the contract, and the plaintiff recovers judgment for 15*l.* and an order for the handing over of the chattels. Could it be said that he had lost his claim for costs because he had recovered less than 20*l.* in an action founded on contract? Or, again, take the case of an action by a purchaser asking for specific performance by

(1) 61 L. J. (Q.B.) 19. (2) 11 C. B. (N.S.) 423.

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the vendor and making a small claim for damages for delay. Such an action, if the value of the property were under 500*l.*, might be commenced in the county court, and would therefore come within the section. Could it be said that if the plaintiff obtained judgment for specific performance and 5*l.* damages for delay he had lost his right to costs because he had not recovered 20*l.* in an action founded on contract? Take the case of a tort arising on the conversion of chattels of the plaintiff valued at 8*l.* and a claim of that amount, and for the delivery over of other chattels of the plaintiff in the defendant's hands and worth a considerable amount. If the plaintiff succeeded in both respects, would he have lost his right to costs on the ground that he had recovered less than 10*l.* in an action founded on tort? It seems to me that the view taken of this matter by the Court of Appeal in Ireland, and by the Queen's Bench Division in *Bradley* v. *Archibald* (1), is a sound view, and that the case of *St. John's College, Cambridge* v. *Pierrepont* (2) was wrongly decided. I will only add that in this case the plaintiff is not prevented, by the order transferring the action to the county court, from saying that his claim is one for substantial relief in addition to a claim for damages; and it is clear that the Divisional Court took that view when they allowed the claim for an injunction. It seems to me, therefore, that the plaintiff was entitled to judgment for his costs of the action, and to that extent the judgment of the Divisional Court should be varied.

MATHEW L.J. It appears that the defendant, availing himself of s. 69 of the County Courts Act, 1888, obtained an order transferring this action to the county court. In the action the plaintiff sought substantial relief in the form of an injunction against the continuance of acts of trespass on his land, and as ancillary to that there was a claim for damages for past acts of trespass when the right to relief should be established. The county court had jurisdiction to deal with a case of this description, as is clear from s. 89 of the Judicature Act, 1873, and Order XXII., r. 12, of the County Court Rules, 1889. The

(1) [1899] 2 I. R. 108.

(2) 61 L. J. (Q.B.) 19.

case, therefore, came within the description in s. 116 of the County Courts Act, 1888, as one that could have been commenced in a county court. After the appeal to the King's Bench Division the case stands as if the judgment directed by that Court had been originally given in the county court, and the plaintiff would clearly be entitled to his costs of the action, unless he is prevented from obtaining them by reason of s. 116. It is said that he is prevented because he has recovered less than 10*l.* in an action founded on tort. In *Danby* v. *Lamb* (1) Erle C.J., dealing with the power of a judge under s. 34 of the Common Law Procedure Act, 1860, to certify to deprive a plaintiff of costs, points out that the section is directed to the case where damages alone are sought to be recovered by way of compensation for a wrong; and the Irish Courts have agreed with this decision, and it has been held that a claim for an injunction where that is the substantial relief sought takes the case out of the rules limiting the plaintiff's right to costs. These decisions are in point in the case before us. The weight of authority is in favour of the contention put forward on behalf of the plaintiff, and the order that should be made is that the plaintiff's costs of the action in the county court should be taxed in his favour.

Appeal allowed.

Solicitors for plaintiff: *Pritchard, Englefield & Co., for Simpson & Co., Liverpool.*

Solicitors for defendant: *Cunliffe & Davenport, for W. H. Churton & Son, Chester.*

(1) 11 C. B. (N.S.) 423.

A. M.

1901
Dec. 14.
1902
Feb. 1.

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED.]

THE KING *v.* JAMES AND JOHNSON.

Criminal Law—Indictment—Wife stealing Goods of Husband when about to leave or desert him—Indictment for Larceny—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

On the trial of a charge against a wife for stealing the goods of her husband when about to leave or desert him, which is made a criminal offence by ss. 12 and 16 of the Married Women's Property Act, 1882, it is not necessary that the indictment should contain averments that the prisoner was the wife of the prosecutor, and that she took the goods in question when leaving or deserting, or about to leave or desert, her husband.]

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the chairman of the Glamorganshire Quarter Sessions.

The prisoners Sarah Eliza James and Thomas Johnson were tried on an indictment in the following form:—

"County of Glamorgan to wit. The jurors for our Lord the King upon their oath present that Sarah Eliza James and Thomas Johnson, on the fifth day of October, in the year of Our Lord One thousand nine hundred and one, at the parish of Pontypridd, in the said county, certain moneys, to wit, three pounds, and a deal box, a sewing-machine, a quilt, two sheets, a waistcoat, a cruet, two pictures, two ornaments, a table-cloth, a tray, two plates, and three glasses, of the moneys, goods, and chattels of John Thomas James, feloniously did steal, take, and carry away against the form of the statute in such case made and provided and against the peace of our Lord the King, his crown and dignity."

It appeared at the trial that Sarah Eliza James was the wife of John Thomas James, and that on the day in question she had, while her husband had been induced by Johnson to accompany him to Cardiff, removed the articles charged from her husband's house and deserted him, and subsequently joined Johnson, in whose possession the articles were found.

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Counsel for the prisoners submitted that the indictment was insufficient against the wife for want of an averment that she was the wife of John Thomas James, and that she had taken the articles when leaving or deserting, or about to leave or desert, her husband.

The chairman held that these averments were not material to the indictment, and, the jury having convicted the prisoners, he stated this case on the question whether it is essential that an indictment against a married woman for stealing the goods of her husband should aver that she was his wife, and wrongfully took the goods when about to leave him. (1)

Lloyd Morgan, for the prisoner James. The indictment was bad. *Reg.* v. *Streeter* (2) is an authority for saying that the stealing by a wife of goods belonging to her husband is not a larceny at common law or under the Larceny Act. It is a statutory offence created by ss. 12 and 16 of the Married Women's Property Act, 1882, and an indictment charging, as this does, simple larceny is insufficient, since directly it was proved that the prisoner was the wife of the prosecutor the offence charged was disproved. The indictment ought to have stated that the prisoner was the wife of the prosecutor, and that she took the goods when leaving or deserting, or about to leave

(1) By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12, "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property as if such property belonged to her as a feme sole . . . . Provided always that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife."

By s. 16, "A wife doing any act with respect to any property of her husband which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband."

(2) [1900] 2 Q. B. 601.

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or desert, her husband. In Hale's Pleas of the Crown (1) it is laid down that an indictment grounded upon an offence made by Act of Parliament must by express words bring the offence within the substantial description made in the Act of Parliament, and "those circumstances mentioned in the statute to make up the offence shall not be supplied by the general conclusion contra formam statuti." [He referred to *Steel* v. *Smith*. (2)]

Albert Parsons, for the prosecution. The indictment is sufficient. *Reg.* v. *Streeter* (3) is not an authority on this case, as the point as to the sufficiency of the indictment was not there taken. The proviso in ss. 12 and 16 of the Married Women's Property Act, 1882, is not a definition of the offence; it merely gives an answer to the defence which might be set up that the prisoner was the wife of the prosecutor. The offence is that of larceny, and is created by the Larceny Act, 1861 (24 & 25 Vict. c. 96). Where an offence is created by one statute and an exception is created by a subsequent statute, it is unnecessary to negative the exception in the indictment: *Rex* v. *Hall* (4); *Thibault* v. *Gibson* (5); Hawkins' Pleas of the Crown, bk. 2, ch. 25, s. 113.

Lloyd Morgan replied.

Cur. adv. vult.

Feb. 1. The judgment of the Court (Lord Alverstone C.J., Lawrance, Wright, Bruce, and Darling JJ.) was read by

LORD ALVERSTONE C.J. At common law a wife could not steal her husband's goods, and now she can only be convicted of larceny by virtue of the provisions of the Married Women's Property Act, 1882, ss. 12 and 16: see *Reg.* v. *Kenny*. (6) [His Lordship read the sections, and continued:—]

Criminal proceedings can only be instituted by the husband against the wife if the wife and husband are not living together at the time the criminal proceedings are taken, and even then they can only be taken concerning an act done by the wife at the time when they were not living together concerning pro-

(1) 2 Hale, P. C. 170.
(2) (1817) 1 B. & Ald. 94.
(3) [1900] 2 Q. B. 601.
(4) (1786) 1 T. R. 320.
(5) (1843) 12 M. & W. 88.
(6) (1877) 2 Q. B. D. 307.

perty of her husband, or unless such property shall have been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband. We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established; and so, if the act relied upon as constituting larceny were proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband. But the question to be determined is whether the conditions imposed by the proviso contained in s. 12 and incorporated into s. 16 are conditions which must be proved by the prosecution to exist in order to establish the offence, or whether the offence may be established without regard to the conditions, in the absence of any evidence offered by defendant of facts which would establish a defence under the proviso. If compliance with the conditions is a necessary ingredient in the offence, then we think statements alleging compliance with the conditions are an essential part of the indictment.

In *Thibault* v. *Gibson* (1) Lord Abinger C.B. said: "I believe it is a well-established principle, that, in all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause which gives the penalty, exempting certain cases from its operation, the declaration or information must shew that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act, it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as a ground of defence."

In the same case Parke B., after quoting a passage from 1 Wms. Saund. (2) much to the same effect as the passage cited from Lord Abinger, proceeds as follows (3): "In all cases of

(1) 12 M. & W. 88, at p. 94. (2) 1 Wms. Saund. 262 a.
(3) 12 M. & W. 88, at p. 95.

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exception, where it comes by way of proviso in a subsequent section, the exception must be noticed by the party who relies on it; and I have some doubt whether the same rule does not also hold, even where the exception comes by way of proviso in the same section, although it will not be necessary to decide that point at present."

In the case of *Rex* v. *Jarvis* (1) Lord Mansfield C.J. says: "It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them."

In the same case Denison J. says (2): "There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth) and those in the purview of the Act." And in the same case Foster J. says (3): "Where negatives are descriptive of the offence, there they must be set forth."

In Chitty on Pleading, 4th ed. vol. i. p. 322, the law is thus stated: "It is material, however, in all cases that the offence or act charged to have been committed or omitted by the defendant appear to have been within the provision of the statute, and all circumstances necessary to support the action must be alleged. . . . Where a person is exempt from a penalty under certain circumstances by a proviso in a statute, and not in the body of it, the plaintiff need not state that the defendant is not within the exemptions, for that is merely matter of defence to be shewn by the defendant; but where the exception is contained in the enacting clause, it must be negatived in the declaration, and where an Act of Parliament in the enacting clause creates an offence and gives a penalty, and in the same section there follows a proviso containing an exception which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative the exception; and in this respect there seems a material difference between a proviso and an exception."

(1) (1754) 1 East, 643, n., at p. 646, n.

(2) 1 East, at p. 647, n.

(3) 1 East, at p. 647, n.

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In *Steel* v. *Smith* (1) the marginal note is to the following effect: "Where an Act of Parliament, in the enacting clause, creates an offence and gives a penalty, and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration." In that case Bayley J. said (2): "I cannot say that the proviso is part of the same sentence; for if it had been omitted, the preceding sentence would have been entire."

In the same case Abbott J. said (2): "There is a technical distinction between a proviso and an exception, which is well understood. All the cases say that if there be an exception in the enacting clause, it must be negatived: but if there be a separate proviso, it need not."

It is true that the last two quotations refer to declarations in civil actions; but the principles applicable are the same, although, no doubt, the principles will be applied with greater strictness in criminal than in civil proceedings.

In Hawkins' Pleas of the Crown, bk. 2, ch. 25, s. 113, there is this passage: "It seems agreed that there is no need to allege in an indictment, that the defendant is not within the benefit of the provisoes of a statute whereon it is founded; and this hath been adjudged, even as to those statutes which in their purview expressly take notice of the provisoes, as by saying, That none shall do the thing prohibited, otherwise than in such special cases, &c., as are expressed in the Act."

We think the substance of the authorities is this: That it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception. Thus in an indictment on a statute which enacts that if any person shall put off any milled money whatsoever unlawfully diminished, and *not cut in pieces* for a lower rate

(1) 1 B. & Ald. 94. (2) 1 B. & Ald. at p. 99.

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than its nominal value, he shall be guilty of felony, it is necessary to state in the indictment that the money was not cut in pieces: *Rex* v. *Palmer*. (1) In the present case, ss. 12 and 16 must be read together, and the enacting clause in s. 12, when read in connection with s. 16, makes the wife liable to criminal proceedings by her husband, subject to the proviso contained in the latter portion of s. 12. But the conditions imposed by that proviso do not affect the quality or character of the offence. They merely introduce matters which may be pleaded by way of defence, and we think they are not matters necessary to be negatived in the indictment.

We have not overlooked the case of *Lemon* v. *Simmons* (2), but it is not, in our opinion, inconsistent with the view which we have expressed.

For these reasons we think the indictment good, and that the conviction should be affirmed.

Conviction affirmed.

Solicitor for prisoner: *Colenso Jones, Pontypridd.*
Solicitor for prosecution: *W. T. Davies, Porth.*

(1) (1773) 1 Lea. 102.

(2) (1888) 57 L. J. (Q.B.) 260.

A. P. P. K.

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED.]

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THE KING *v.* PENFOLD.

Criminal Law—Charge of being in Public Place with Intention of committing Offence—Proof of Previous Convictions—Prevention of Crimes Act, 1871 (34 & 35 *Vict. c.* 112), *ss.* 7, 9—24 & 25 *Vict. c.* 96, *s.* 116.

On the trial of an indictment charging the prisoner with an offence under s. 7 of the Prevention of Crimes Act, 1871, the previous convictions are a necessary ingredient of the offence, and may be given in evidence before the jury in the first instance.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the chairman of the Clerkenwell Sessions.

The prisoner was tried and convicted on an indictment in the following form:—

"County of London to wit. The jurors for Our Lord the King upon their oath present that James Penfold, on the thirteenth day of December, in the year of Our Lord One thousand nine hundred and one, was charged before a court of summary jurisdiction, to wit, before John Bros, Esquire, one of the magistrates of the police courts of the metropolis, sitting at the Clerkenwell Police Court in the said county, with the offence hereinafter charged and stated, and the said James Penfold, on appearing before the said Court and before the said charge was gone into, claimed to be tried by a jury; and the said court of summary jurisdiction thereupon dealt with the said case in all respects as if the said accused, to wit, the said James Penfold, was charged with an indictable offence and not with an offence punishable on summary conviction; and after hearing the said charge the said court of summary jurisdiction committed the said James Penfold for trial to the general quarter sessions of the peace for the county of London, to be holden on the first day of January, One thousand nine hundred and two.

"And the jurors aforesaid upon their oath aforesaid do further

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present that, on the ninth day of January, in the year of Our Lord One thousand nine hundred, at the general quarter sessions of the peace, held at the sessions house at Clerkenwell Green, in and for the county of London, the said James Penfold was convicted on indictment of a crime, to wit, felony, and a previous conviction of a crime, to wit, felony, was then proved against the said James Penfold, and the said James Penfold was thereupon, on the said ninth day of January, One thousand nine hundred, ordered to be imprisoned and kept to hard labour for eighteen calendar months.

"And the jurors aforesaid upon their oath aforesaid do further present that the said James Penfold, within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, to wit, on the twelfth day of December, in the year of Our Lord One thousand nine hundred and one, was found in certain public places, to wit, Goswell Road and Northampton Square, in the parish of St. James, Clerkenwell, in the said county, under such circumstances as to shew that he was about to commit an offence punishable on indictment, to wit, felony, to steal, take, and carry away the moneys, goods, and chattels of a certain person, whose name to the jurors aforesaid is unknown, against the form of the statute in that case made and provided." (1)

At the trial, evidence having been given of the prisoner having been found in the places in question under circumstances which raised the suspicion that he was about to commit a felony, it was proposed to call evidence of the previous conviction. Counsel for the prisoner objected, and contended that under s. 116 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which was applied to the Prevention of Crimes Act, 1871, by s. 9 of the

(1) By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 7, "Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment with or without hard labour under the following circumstances: . . . . If he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom he is brought that he was about to commit, or to aid in the commission of, any offence punishable on indictment or summary conviction . . . ."

latter Act, evidence of previous conviction ought not to be given until the jury had found that the prisoner had been found at the places in question under circumstances shewing that he was about to commit a felony. He cited in support of this view a decision of the Recorder of London in *Rex* v. *Brown*. (1)

For the prosecution it was contended that the previous conviction was an essential part of the offence, and reference was made to *Reg.* v. *Floyd* (2), in which Sir Peter Edlin, K.C., had expressed an opinion that a count for attempted housebreaking ought not to be added to an indictment under s. 7 of the Prevention of Crimes Act, 1871, because the jury in trying the first count would become aware of the previous convictions against the prisoner.

The chairman overruled the objection and admitted the evidence, and, the prisoner having been convicted, stated this case for the opinion of the Court.

No counsel appeared for the prisoner.

H. Sutton, for the prosecution. The evidence was rightly admitted. The previous convictions are a necessary constituent part of the offence. It is plain from the definitions of "crime" and "offence" in s. 20 of the Prevention of Crimes Act, 1871, and from the application in s. 9 of that Act of the provisions of s. 116 of 24 & 25 Vict. c. 96 to "crimes," that the Legislature deliberately intended to exclude offences under s. 7 from the benefit of that section.

LORD ALVERSTONE C.J. It appears that there has been some doubt as to the practice which ought to prevail where there is a trial of an indictment under s. 7 of the Prevention of Crimes Act, 1871. Of course, in cases where a crime which is complete in itself is charged in an indictment which also charges a previous conviction, but different degrees of punishment may be inflicted in accordance with the antecedents of the prisoner, evidence of the previous conviction ought not to be given until the subsequent charge has been proved. To prevent any difficulty, s. 116 of 24 & 25 Vict. c. 96 was passed,

(1) (1901) 65 J. P. 136. (2) (1892) 56 J. P. 713.

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which provides that the offender shall in the first instance be arraigned on so much of the indictment as charges the subsequent offence, and after the inquiry into the subsequent offence is concluded he shall then, and not before, be asked whether he had previously been convicted as alleged in the indictment.

Then came the Prevention of Crimes Act, 1871, which, by some of the sub-sections of s. 7, provided that a state, or rather a combination, of circumstances should create an offence which would be no offence at all but for the offender having been previously convicted within a certain time. The indictment in this case alleges all the necessary ingredients of the offence. Had the prisoner been tried summarily before the magistrate, the whole story must have been gone into and the previous convictions must have been proved. The prisoner, however, elected to be tried by a jury, and, in my opinion, it is right that the ingredients which are necessary to constitute the offence should be proved before whatever tribunal has to try the case. The offence here is a statutory offence, and it is not complete unless the particular circumstances, the previous convictions, and the time are all proved; and these necessary ingredients, as I have called them, should therefore all be given in evidence before the tribunal, whether it be a court of summary jurisdiction or a jury. It seems to me that no distinction can be made between the trial before magistrates and that before a jury.

No doubt s. 9 of the Prevention of Crimes Act, 1871, applies the practice laid down in s. 116 of 24 & 25 Vict. c. 96, in regard to proceedings upon an indictment for an offence committed after previous conviction, to "any indictment for committing a crime as defined by this Act after previous conviction for a crime"; but s. 20 of the Act of 1871 defines both "crime" and "offence," and it is plain that the set of circumstances contemplated by s. 7 are "offences" as distinguished from "crimes" by those definitions. It seems to me that the right practice has been followed in this case, and that the conviction should be affirmed. I ought to add that we are unable to agree with the opinion to the

contrary effect expressed by the Recorder of London in *Rex* v. *Brown*. (1)

WRIGHT J. I agree.

RIDLEY J. I agree after some hesitation. When the nature of the offence necessitates the proof of the previous conviction, and the offence is incomplete unless there is a previous conviction, then I think it is right that it should be given in evidence before the jury in the first instance. In any other case it is not desirable that the previous conviction should be known to the jury until the subsequent offence has been proved.

BIGHAM J. It seems to me sufficient to say that in this case evidence of the previous conviction was necessary in order to prove the offence with which the prisoner was charged, and that it was therefore rightly admitted.

WALTON J. concurred.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*

(1) 65 J. P. 136.

A. P. P. K.

1902
Feb. 1.

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED.]

THE KING *v.* PIKE.

Criminal Law—Evidence—Statement of Affairs in Bankruptcy—Admissibility—Misappropriation by Trustee—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *ss.* 80, 85—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 27, *sub-s.* 2.

A statement of affairs prepared by a debtor in the course of his bankruptcy under s. 16 of the Bankruptcy Act, 1883, is admissible in evidence against him on a charge, under 24 & 25 Vict. c. 96, s. 80, of misappropriation of money of which he was a trustee.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by Kennedy J.

W. G. Pike was tried at Worcester on December 23, 1901, on an indictment for misdemeanour consisting of two counts, whereby in substance and effect he was charged, under 24 & 25 Vict. c. 96, s. 80, with having unlawfully and wilfully converted and appropriated to his own use certain sums of money, of which, under the will of one William Ayre, deceased, he was trustee for the use and benefit of three children of his brother S. R. Pike, with intent to defraud.

In the course of the trial, in order to prove the receipt by the prisoner of certain sums of money, his statement of affairs in bankruptcy was tendered in evidence, which shewed the receipt by him of the moneys in question. The statement of affairs was the statutory statement of affairs prepared by the prisoner in the course of his bankruptcy, verified by oath of the bankrupt before the assistant official receiver, and filed by the assistant official receiver in accordance with the provisions of s. 16 of the Bankruptcy Act, 1883, and rule 217 of the Bankruptcy Rules.

Counsel for the prisoner objected to the receipt of this evidence on the ground that it was evidence which was rendered inadmissible by the operation of the provisions of

24 & 25 Vict. c. 96, s. 85, and s. 27, sub-s. 2, of the Bankruptcy Act, 1890. (1)

The learned judge overruled the objection, and admitted the evidence. The prisoner was convicted and sentenced to three years' penal servitude, but the learned judge stated this case for the opinion of the Court.

J. B. Matthews, for the prisoner. The statement of affairs was wrongly received in evidence. It is a compulsory statement by the Bankruptcy Act, 1883, s. 16, and rule 217, and it is made in an examination because it is not necessary to an examination that questions should actually be put. It is part of the bankruptcy proceedings, and, as the bankrupt may be examined upon the statement on his public examination before the Court, it is part of the hearing. [He referred to *Green* v. *Lord Penzance* (2); *Fletcher* v. *Lord Sondes* (3); *The Gauntlet* (4); *In re Mysore Mining Co.* (5)]

A. T. Lawrence, K.C. (*N. G. Davidson* with him), for the prosecution. In order to make the statement of affairs inadmissible it must come within the words of s. 27, sub-s. 2. No doubt it is compulsory, but that is not sufficient. It is not part of his compulsory public examination nor is it a deposition since that word refers to the power given by s. 2, sub-s. 2, of the Bankruptcy Act, 1890, to dispense with the public examination of a debtor where he is suffering from mental or physical disability.

[He was stopped.]

LORD ALVERSTONE C.J. We are all of opinion that the statement of affairs was admissible in evidence. The prisoner

(1) By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27, sub-s. 2, "A statement or admission made by any person in any compulsory examination or deposition before any Court, on the hearing of any matter in bankruptcy, shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to" in s. 85 of 24 & 25 Vict. c. 96, which include misappropriation by trustees.

(2) (1881) 6 App. Cas. 657.

(3) (1826) 3 Bing. 501; 30 R. R. 32.

(4) (1872) L. R. 4 P. C. 184.

(5) (1889) 42 Ch. D. 535.

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was charged with the misappropriation of trust funds, and in order to prove that charge the statement of affairs made by him in the course of his bankruptcy was tendered as evidence against him. It is contended that that was inadmissible by reason of s. 27, sub-s. 2, of the Bankruptcy Act, 1890, which runs thus: "A statement or admission made by any person in any compulsory examination or deposition before any Court, on the hearing of any matter in bankruptcy, shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to" in s. 85 of 24 & 25 Vict. c. 96. It is said that the statement of affairs which a bankrupt is bound to make and verify by oath is inadmissible in evidence against him because it is compulsory and is part of the hearing. I think that we must look at the object of the sub-section, and that the words "in any compulsory examination or deposition before any Court, on the hearing of any matter in bankruptcy," must primâ facie be intended to protect the debtor in a case where he has been cross-examined, or has made a deposition on which he can be cross-examined. Now, can a bankrupt's statement of affairs come within those words? It has been argued that the statement of affairs is part of the hearing because, on the compulsory public examination of the debtor, questions might be put to him in regard to that statement, and that, therefore, the statement of affairs is part of the hearing of a compulsory examination before the Court. It seems to me that if the Legislature had intended the section to have that effect they would have used different language. In my opinion, the statement of affairs filed by the bankrupt in pursuance of his duty under the Bankruptcy Act is not a statement made by him in any compulsory examination before any Court upon the hearing of any matter in bankruptcy within the meaning of the section. It was, therefore, admissible in evidence, and the conviction must stand.

WRIGHT J. I am of the same opinion; but I think it might be right to alter the law in this respect for two reasons. First, there is a certain unfairness in using against a man a compulsory admission by him; and, secondly, if a man knows that

it can be used against him there is some danger that he will not make full admissions in his statement.

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RIDLEY, BIGHAM, and WALTON JJ. concurred.

Conviction affirmed.

Solicitors for prisoner: *Dobbs & Hill.*
Solicitor for prosecution: *Solicitor to the Treasury.*

A. P. P. K.

In re KEEN & KEEN. *Ex parte* COLLINS.

1902
Feb. 10, 11.

Bankruptcy—Building Agreement—Plant and Materials on Premises—Lien of Building Owner—Order and Disposition—Forfeiture of Plant by Builder after Bankruptcy—Protected Transaction.

By a building contract made between a firm of builders and a school board, it was provided by clause 10 that all plant and materials brought on to the ground by the builders for the purposes of the building should be considered to be the property of the board, and that they should not be removed by the builders or any other person without the licence of the architect, but that the board should not be answerable for any loss or damage which might happen to them; and by clause 20 that, if the builders should delay the performance of their contract, the board might give the builders notice to proceed with the work, and that in the event of their not doing so within seven days the plant, &c., should be forfeited to the board. The builders having become bankrupt, the board subsequently to the commencement of the bankruptcy gave to the builders and to their trustee notice under clause 20 to proceed with the work, and upon non-compliance with the notice the board claimed that the plant and materials upon the premises were forfeited, and that they were entitled to retain them as against the trustee:—

Held, (1.) that clause 10 of the contract did not vest the ownership of the goods in the board, and that consequently they were not in the order and disposition of the debtors by the consent of the "true owner" within the meaning of s. 44 of the Bankruptcy Act, 1883, and did not pass to the trustee as being in the reputed ownership of the debtors; (2.) that the board's right to issue the notice under clause 20 was unaffected by the bankruptcy; and that although the goods were the property of the debtors at the commencement of the bankruptcy, the title of the trustee was determined by the forfeiture, and the board were entitled to retain them.

APPEAL from the county court of Somersetshire holden at Bridgwater.

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KEEN & KEEN, *In re.*
COLLINS, *Ex parte.*

By a contract dated September 4, 1899, the debtors, Messrs. Keen & Keen, who were a firm of builders, contracted to erect for the school board of the city of Bristol certain school buildings. The contract by clause 10 provided as follows: "All plant, work, and materials brought to and left upon the ground by the contractor or by his order for the purpose of carrying out the contract, or of forming part of the works, shall be considered to be the property of the board, and the same shall not on any account whatever be removed or taken away by the contractor or by any other person without the express licence in writing of the architect, but the board shall not be in any way answerable for any loss or damage which may happen to or in respect of any such plant, work, or materials, either by the same being lost, stolen, or injured by weather or otherwise." And by clause 20: "If the contractor . . . . shall suspend or delay the performance of his contract . . . . the board by the architect shall be at liberty to give to the contractor, his executors, administrators, or his assignee or trustee, as the case may be, notice in writing requiring the works to be proceeded with, and in case the contractor or his executors or administrators, or his assignee or trustee, shall not within seven days proceed with the work to the satisfaction of the architect, no further sums of money shall be paid on account of the contract by the board, and all plant and materials upon the property shall be forfeited to the board, and in such event it shall be lawful for the board by the architect to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete the same." The contract contained no provision for the revesting of the plant, &c., in the builders upon the due completion of the works.

On February 16, 1900, the debtors filed their petition in bankruptcy, and on March 1 were adjudged bankrupts. On February 22, 1900, the school board, in pursuance of clause 20 of the contract, gave the debtors and the official receiver in bankruptcy notice to proceed with the works. On March 2 one Collins was appointed trustee of the debtors' estate, and a further extension of time was given by the board to the trustee for the completion of the works. The trustee, however, decided not

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to take over the contract, and the works were not proceeded with in compliance with the notice. Thereupon the board took possession of the plant and materials upon the premises, and sold them to a firm of Wilkins & Co., who agreed with the board to take over the building contract. The trustee claimed the goods, and moved in the county court in bankruptcy for a declaration that he was entitled to them as being in the order and disposition of the debtors by the consent of the board as the true owners under such circumstances as to make the debtors the reputed owners. The county court judge decided in favour of the trustee. Against that decision the school board appealed.

H. Reed, K.C., and *F. E. Weatherly*, for the appellants. The doctrine of reputed ownership does not apply. The goods were not in the order and disposition of the debtors. They were not in their possession. They were on the land of the school board, and the debtors had no power to take them away. But, even if they were in the debtors' possession, they were not so by the consent of the true owners, for the board were not the owners. There is no clause in the contract saying that the plant, &c., shall, upon being brought on to the land, become the property of the board, as was the case in *Reeves* v. *Barlow*. (1) The words here are, "shall be considered to be the property of the board." That merely means that they shall be treated as if they were the property of the board so long as the contract is being carried out, and shall not be taken away by the builder until the building is finished. The words must be read along with the later paragraph in clause 10, which says that the board are not to be answerable for loss or damage, a provision which would be meaningless if the goods were the board's property. Clause 20 of the contract provides that the goods shall be forfeited to the board in certain contingencies, which shews that until the happening of those contingencies it was not intended to vest the property in the board. Again, the absence of a revesting clause to enable the builders to take

(1) (1884) 12 Q. B. D. 436.

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the plant, &c., away on the completion of the building points in the same direction. But, although the goods were the property of the debtors at the date of the bankruptcy, their title to them was a defeasible title by reason of the provision in clause 20 as to forfeiture in the event of delay in completing the works after notice. The board's right of forfeiture under that clause was not defeated by the fact of the builders becoming bankrupt before the forfeiture had accrued. The builders' trustee took subject to the right of the board under the contract: *Ex parte Newitt, In re Garrud.* (1) The agreement as to forfeiture was a protected transaction within s. 49 of the Bankruptcy Act, 1883: *In re Waugh, Ex parte Dickin.* (2)

Muir Mackenzie and *Vachell*, for the trustee. The doctrine of reputed ownership applies. The board became by virtue of clause 10 the owners of the goods as soon as they were brought on to the premises. In *Brown* v. *Bateman* (3), where the stipulation was, as here, that all materials brought on to the premises for the purposes of the building "*shall be considered as* immediately attached to the premises," the Court held that, whether the interest of the building owner in the materials so brought there was legal or equitable—as to which they gave no decision—it was at all events such an equitable interest as to disentitle the sheriff to seize the materials in an execution against the builder. But if the building owner in such a case is sufficiently the owner to defeat an execution, he must also be sufficiently the owner for the purposes of the reputed ownership section: s. 44, sub-s. iii. The effect of clause 10 is to give the board at all events an equitable interest in the nature of a lien as a security for the due carrying out of the contract. And such an equitable interest is sufficient. In *Shuttleworth* v. *Hernaman* (4), where a tenant of a cotton mill covenanted with his lessor to keep in the mill cotton-spinning machinery of the value of 3000*l.* as a security for the rent, it was held that the covenant constituted the lessor the owner of the machinery for the purposes of the section, and disentitled

(1) (1881) 16 Ch. D. 522.
(2) (1876) 4 Ch. D. 524.
(3) (1867) L. R. 2 C. P. 272.
(4) (1857) 1 De G. & J. 322.

him to retain it as against the tenant's assignee in bankruptcy. Turner L.J. there said: "If a mortgage of these chattels had been made to the landlord to secure his rent the case would have been within the words of the Act. Here there was no actual mortgage, but an attempt to create a lien by means of a covenant in the lease. As the letter of the Act is against a mortgage, so I think its spirit is against a lien like this." The goods then being the property of the board were in the possession of the debtors, for they used them for the purposes of the building. And they were so in the debtors' possession by the board's consent. The fact that the contract implied that the debtors were to have the right of user, and that consequently so long as the work was being carried on the board were not to remove the goods from the debtors' possession, did not negative their consent: *In re Ginger, Ex parte London and Universal Bank.* (1) But if clause 10 is not against the contention of the board, clause 20 does not assist them. The notice upon which the forfeiture depended was given too late, for the rights of the trustee had already matured at the date of the receiving order.

WRIGHT J. In this case I am of opinion that upon the true construction of the agreement the school board were not the owners of the plant and materials upon the premises at the time of the bankruptcy. The language of the agreement is wholly different from that in *Reeves* v. *Barlow.* (2) Here all that the board had was a contractual right to have the goods remain on the land for use by the builders in the construction of the building. That right, whether it be more correctly described as an equitable or as a legal right, vested in the board before the bankruptcy, and could only be overridden by the bankruptcy in the event of the facts establishing a case of reputed ownership under the provisions of s. 44. Now, in order to establish such a case three things must be shewn: that the goods were in the possession of the builders, that the board consented to their so being in their possession, and that they

(1) [1897] 2 Q. B. 461. (2) 12 Q. B. D. 436.

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Wright J.

consented to their being reputed to be the owners of them. With regard to the first point, it is true that the goods were in one sense in the possession of the builders; but it was an ambiguous possession, and one which they could not make use of to remove the goods from the premises. It might also in some sense be said that the board had an interest in the nature of possession of the goods as well as the builders, for without the board's consent the goods could not be removed or made use of in any way except for the building. With respect to the third point as to the board's consent to the builders' reputation of ownership, I think that no inference of any such consent can properly be drawn. The builders were under the agreement entitled to be in the position of owners of the goods so long as the building went on, for the purpose of using them in the building, and the consent of the board did not go beyond that. They merely consented that the goods should remain on the land for the very purpose for which they were placed there. The decision in *Shuttleworth* v. *Hernaman* (1) seems to me to be quite different. There the tenant of a cotton mill covenanted with his landlord to keep upon the premises machinery of a certain value as security for the rent. Upon the tenant becoming bankrupt the landlord claimed to resist the removal of the machinery by the official assignee on the ground that he had a lien upon it under the covenant, and the Lords Justices held that the claim could not be supported. But there the keeping of the machinery upon the premises as security for the rent was not a furtherance of the object with which it was brought there; and it was quite a different case from that of leaving building materials upon the ground when the whole object of the arrangement is that they shall be used in the building. I think that the goods here were not in the reputed ownership of the debtor.

BIGHAM J. I am of the same opinion. At the date of the receiving order these chattels were, in my opinion, the property

(1) 1 De G. & J. 322.

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Bigham J.

of the bankrupts and not of the school board. No doubt clause 10 of the contract provides that "all plant, work, and materials brought to and left upon the ground by the contractor . . . . shall be considered to be the property of the board." If read by itself, that is an ambiguous phrase, but when read in connection with the rest of the same clause, and with reference to the whole purpose and scope of the contract, it becomes reasonably clear that it was not intended to vest the materials at once in the building owners. Clause 10 goes on to say, "And the same shall not on any account whatever be removed or taken away by the contractor or by any other person without the express licence in writing of the architect." There would be no necessity for that provision if the property had passed out of the builders into the board. While the clause concludes with words which still more clearly negative the board's ownership—"the board shall not be in any way answerable for any loss or damage which may happen to or in respect of any such plant, work, or materials, either by the same being lost, stolen, or injured by weather or otherwise." Further, it is matter of common knowledge that under a building contract such as this, upon the completion of the works the builders take away the plant and any surplus materials that may happen to be on the ground. But by what right would the builders take them away here? Not by reason of any revesting of the property in them, for there is no revesting clause in the contract. Their right to take them away would arise from the fact that they had never ceased to be their property. But though the goods were at the date of the receiving order the goods of the builders, the contract provided by clause 20 that on a certain contingency—that is to say, in the event of the builder or his trustee neglecting to proceed with the work for seven days after receiving notice in writing to do so—the plant and materials on the premises should be forfeited to the board. The trustee, when his title to the goods accrued, took them subject to that contingency. The builder's title to the goods was a defeasible one, and the trustee could have no better title. Here that contingency happened, and transferred the property

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from the trustee to the school board. The appeal must be allowed.

Judgment for the appellants.

Solicitors for appellants: *Gamlen, Burdett & Gamlen, for Brittan, Livett & Miller, Bristol.*

Solicitors for respondent: *Ford & Ford, for Wansbrough, Dickinson & Co., Bristol.*

J. F. C.

C. A.

1902

Jan. 30.

[IN THE COURT OF APPEAL.]

THE GUARDIANS OF THE POOR OF THE WEST HAM UNION, APPELLANTS; THE LONDON COUNTY COUNCIL, RESPONDENTS.

Poor Law — Pauper—Parish of Settlement — Addition to Area — Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act*, 1879 (42 & 43 *Vict. c.* 54).

By an order of the Local Government Board made under the provisions of the Divided Parishes and Poor Law Amendment Act, 1876, as amended and extended by the Poor Law Act, 1879, a portion of another parish was added to and amalgamated with a parish in which a pauper had previously acquired a settlement:—

Held, that the order did not operate to destroy the identity of the parish to which the portion of the other parish was added, and that the settlement of the pauper remained unaffected.

Judgment of the King's Bench Division, [1901] 1 K. B. 720, affirmed.

APPEAL from the judgment of a Divisional Court, reported [1901] 1 K. B. 720, on a case stated by the court of quarter sessions for the county of London, on an appeal from an order of two justices of the county that the place of the last legal settlement of a pauper lunatic named Elizabeth Heritage was in the parish of West Ham, in the West Ham Union.

It appeared that Elizabeth Heritage was born in the parish of West Ham, in the West Ham Union, on February 11, 1852, and that she resided in that parish for about seventeen years until the month of August, 1888, in such manner and under such circumstances during the whole period of seventeen years and in each of such years as to render her irremovable from the parish in which such residence took place.

By an order of the Local Government Board, dated August 24, 1886, and made under the provisions of the Divided Parishes and Poor Law Amendment Act, 1876, as amended by the Poor Law Act, 1879, reciting that the parish of Wanstead was a divided parish within the meaning of the said Acts, a certain part thereof being isolated and detached or nearly detached from the residue thereof, namely, all that part which is included in the borough of West Ham, and that it was expedient that the aforesaid part of the parish of Wanstead should be amalgamated with the parish of West Ham, it was ordered that "All that part of the parish of Wanstead which is included in the borough of West Ham shall cease to be part of that parish, and shall be amalgamated with the parish of West Ham."

Elizabeth Heritage left the parish of West Ham in the month of August, 1888, and did not thereafter acquire a settlement in any parish. She was afterwards found as a pauper lunatic in the hamlet of Ratcliff, in the Stepney Union, in the county of London, and was sent to the Claybury Lunatic Asylum, belonging to the London County Council.

On February 14, 1900, by an order of two justices for the county of London, she was adjudged under s. 290 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), to be chargeable to the county of London. On May 15, 1900, the London County Council procured the order appealed from as to the settlement of the pauper. The guardians of the West Ham Union appealed to quarter sessions, and the appeal was allowed, but on the application of the London County Council this case was stated for the opinion of the Court.

The Divisional Court reversed the order of quarter sessions. (1)

The guardians of the West Ham Union appealed.

Avory, *K.C.*, and *J. C. Earle*, for the guardians, in support of the appeal. The cases of *Reg.* v. *Tipton* (2) and *Dorking Union* v. *St. Saviour's Union* (3) and intermediate cases established that if an Act of Parliament is to be treated as abolishing

(1) [1901] 1 K. B. 720. (2) (1842) 3 Q. B. 215.
(3) [1898] 1 Q. B. 594.

C. A. 1902

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an old parish and creating new parishes instead of it, then, unless there is some express enactment in the statute that the liabilities of the old parish shall be borne by the new parishes, no liability is imposed on the new parishes by reason that it happened to be a liability which had to be borne by the old parish. The ground of the decision in *Reg.* v. *Tipton* (1) is that it is improper to cast a burden on persons other than those of the parish to which the burden was applicable in the first instance. In this case some of the parishioners of Wanstead, who were not in any way liable to the maintenance of the pauper, have been transferred to West Ham, and, if the pauper is chargeable to West Ham, a liability will be imposed on them. In the case of Wanstead it would hardly be contended that the taking away of a part of the parish had not destroyed its identity, and the addition to West Ham has in like manner destroyed the identity of that parish. Without some legislative authority, as in the case of the metropolitan boroughs under the Poor Law and Valuation Scheme authorized by the London Government Act, 1899, residence in the parish as it originally stood cannot be treated as if it were residence in the parish as it stands with altered boundaries.

Macmorran, K.C., and *Daldy*, for the London County Council. The principle which governs the series of cases—*Reg.* v. *Tipton* (1), *Reg.* v. *Hunnington* (2), *Stourbridge Union* v. *Droitwich Union* (3), and *Dorking Union* v. *St. Saviour's Union* (4)—is not that suggested for the appellants, but is that where a parish has ceased to exist settlements in the parish also cease. There is no authority for saying that any addition to a parish, as, for instance, the addition by statute of the foreshore, is to have the same effect as if the parish had ceased to exist. *Reg.* v. *St. Martin New Sarum* (5), which was the case of an amalgamation of two parishes, is a clear authority in favour of the order. The addition of a part of the parish of Wanstead has not destroyed the identity of the parish of West Ham. What the effect of the order may be so far as the parish of Wanstead is

(1) 3 Q. B. 215.
(2) (1843) 5 Q. B. 273.
(3) (1871) L. R. 6 Q. B. 769.
(4) [1898] 1 Q. B. 594.
(5) (1846) 9 Q. B. 241.

concerned is not material in considering questions of settlement in West Ham.

Avory, K.C., in reply. The case of *Reg.* v. *St. Martin New Sarum* (1) is no authority in the present case, for it turned on the construction of a special Act by which two separate parishes were united, and it was only reasonable that their burdens should be borne jointly.

COLLINS M.R. This case raises the question whether a pauper who was born in the parish of West Ham, and has not acquired a settlement elsewhere, has lost her settlement in West Ham. It appears that under the Divided Parishes Act, 1876, there has been added to the parish of West Ham a detached portion of the parish of Wanstead, and the question in this case arises after this accretion to the parish of West Ham. It has been decided in the Divisional Court that the settlement of the pauper in West Ham has not been lost. It is contended for the appellants that this decision is wrong because it is inconsistent with a line of cases the last of which is *Dorking Union* v. *St. Saviour's Union* (2), in which it was held that where a pauper had acquired a settlement in a parish and that parish was broken up, its entity ceased, with the result that the settlement was lost. There is a line of cases to that effect, and, though doubts have been suggested, the decisions have not been overruled.

In my opinion the judgment of the Divisional Court in this case was right, because the facts of the present case distinguish it from the line of cases that have been cited. The distinction is that in the case of the parish of West Ham there has been no destruction of the identity of the parish by the addition to its area of part of another parish. All that has happened is that there has been an accretion to the parish, and, when we look at the legislation by which that has been acquired, it does not point to anything analogous to the division of a parish into separate parts. Sect. 1 of the Act 39 & 40 Vict. c. 61 deals with the case of a parish "divided so as to have its parts or any of them isolated in some other parish or parishes or otherwise detached,"

(1) 9 Q. B. 241. (2) [1898] 1 Q. B. 594.

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and the Local Government Board are empowered to make an order "either for constituting separate parishes out of the divided parish or for amalgamating some of the parts thereof with the parish or parishes in which the same may be locally included, or to which they may be annexed." An order made under this section necessitates, so far as the parish to which an accretion is made, no division of that parish or destruction of its identity in the sense in which that had happened in the earlier cases that have been cited. If the matter before us were uncovered by authority, I should be of opinion that an order such as was made in the present case did not destroy the identity of either parish, so as to bring them within the line of cases which depend on loss of identity. We are not, however, without authority on the point, for in the case of *Reg.* v. *St. Martin New Sarum* (1) two entire parishes were amalgamated, and it was held that settlement in one of the parishes, acquired before the amalgamation, remained as a settlement in the united parishes. That decision destroys the main argument for the appellants, which was that by the order in this case persons who were inhabitants of Wanstead when the settlement was acquired in West Ham were made responsible for a pauper belonging to the latter parish. That is what happened in the case of the amalgamation of the two parishes which gave rise to the decision in *Reg.* v. *St. Martin New Sarum.* (1) This case seems to me to fall outside the line of cases cited as authorities for the appellants' contention, which do not prevent us from saying that the mere accretion of a small portion of the parish of Wanstead to the parish of West Ham, where such accretion does not purport to destroy the identity of West Ham, does not in fact have that effect.

I think, therefore, that this appeal should be dismissed.

ROMER L.J. I am of the same opinion. The case of *Reg.* v. *Tipton* (2) and the cases that followed it cannot be disregarded, however unsatisfactory may appear to be the reasoning on which they are founded. I do not think, however, that their effect should be extended. The decision in *Reg.* v. *Tipton* (2) was

(1) 9 Q. B. 241. (2) 3 Q. B. 215.

that a settlement in a parish that had been divided up into several parishes ceased to exist. That decision does not apply to the present case. The parish of West Ham has not been destroyed, but still exists as a parish, notwithstanding that some portion of another parish has been added to it.

MATHEW L.J. I agree with the opinion expressed by Lindley M.R. in *Dorking Union* v. *St. Saviour's Union* (1) that a narrow construction was put upon the statute of Charles by the learned judges who decided the case of *Reg.* v. *Tipton* (2) and the cases which followed it. The decision in the last-mentioned case was that where a parish consisting of several townships had been divided into distinct parishes, a pauper who had been born in one of the townships before the separation had lost her settlement. It was admitted in subsequent cases that this was a narrow construction of the Act, but it was adopted and followed in a succession of cases. As the law stands, if a parish is divided into two parts each of which becomes a separate parish, it is imputed to the Legislature that it was intended that any settlement in the undivided parish should disappear. The case before us is a different one, for here there has been an accretion to the parish of West Ham which has become a part of that parish. The effect of the argument for the appellants would be that the old parishes of West Ham and Wanstead would disappear altogether by reason of the order of the Local Government Board. I think, however, that the order was framed so as to avoid any such result, and I agree with the judgment of the Divisional Court.

Appeal dismissed.

Solicitors for appellants: *Hillearys.*
Solicitor for respondents: *W. A. Blaxland.*

(1) [1898] 1 Q. B. 594. (2) 3 Q. B. 215.

A. M.

C. A.
1901
Dec. 5, 13.
1902
Feb. 14.

[IN THE COURT OF APPEAL.]

THE LONDON AND INDIA DOCKS COMPANY *v.* THE GREAT EASTERN RAILWAY COMPANY AND THE MIDLAND RAILWAY COMPANY.

Railway—Dock Company—Lines within Area of Dock Estate—Continuous Line of Railway Communication—Through Rates—Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25), *s.* 25—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 3.

A dock company, constituted under Acts of Parliament, had, in pursuance of provisions in their Acts, laid down within their docks lines of rails and sidings, connected with the line of a railway company, for the purpose of the carriage of goods in the trucks and wagons of the railway company from and to the system of the railway company to and from the quays and warehouses in the docks. The Acts of the dock company did not, in respect of these lines and sidings, incorporate the provisions of the Railways Clauses Consolidation Acts or contain any of the usual statutory provisions with regard to railways. The dock company applied to have through rates fixed by the Railway Commissioners in respect of traffic from the quays and warehouses in their docks to certain places on the railway company's system under s. 25 of the Railway and Canal Traffic Act, 1888, which provides, in substance, that the facilities to be afforded by railway companies under s. 2 of the Railway and Canal Traffic Act, 1854, in cases where a railway forms part of a continuous line of railway communication, shall include the due and reasonable receiving, forwarding, and delivering by every railway company, "at the request of any other such company," of through traffic to and from the railway of any other such company at through rates:—

Held, reversing the decision of a majority of the Railway Commissioners, that, under the provisions of their Acts, the applicants were not a "railway company" in respect of the before-mentioned lines and sidings, and that those lines and sidings were not a "railway," and did not form part of a "continuous line of railway communication," within the meaning of the Railway and Canal Traffic Act, 1888, and therefore the applicants were not entitled to through rates under s. 25 of that Act.

APPLICATION to the Railway Commissioners by the London and India Docks Company under s. 25 of the Railway and Canal Traffic Act, 1888, for an order allowing through rates for traffic passing over certain lines of rails belonging to the applicants in the Royal Victoria and Albert Docks to certain stations on the Midland Railway, by a route which passed over

certain portions of the Great Eastern Railway Company's lines. The applicants proposed certain through rates to be apportioned between themselves, the Great Eastern Railway Company, and the Midland Railway Company.

The applicants were a company formed by the amalgamation into one company of the London and St. Katharine Docks Company and the East and West India Docks Company under the London and India Docks Amalgamation Act, 1900 (63 & 64 Vict. c. cxi.).

By the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), the London Dock Company and the St. Katharine Dock Company were amalgamated into one company under the name of the London and St. Katharine Docks Company. By that Act the London Docks, the St. Katharine Docks, and the Victoria Docks, and all the works and property belonging thereto respectively, were vested in the amalgamated company. Authority for the construction of the Victoria Docks had originally been given to a company called the Victoria (London) Dock Company by the Victoria (London) Docks Act, 1853 (16 & 17 Vict. c. cxxxi.), the provisions of which were repealed by the London and St. Katharine Docks Act, 1864, with the exception of such as were preserved in force and incorporated by the last-mentioned Act, among which were ss. 28 and 69 of the Victoria (London) Docks Act, 1853. By s. 28 it was provided that it should be lawful for the dock company, in connection with the docks, to make such timber ponds, basins, dry or graving docks, slips, inclined planes, wharves, quays, and tramways, and to erect such warehouses, sheds, cranes, and engines, and to make all such other works as are authorized by the Harbours, Docks, and Piers Clauses Act, 1847, as the company might think proper. By s. 69 the dock company were required to allow the Eastern Counties Railway Company to lay down on their lands lines of rails, or trams, or railways, on both sides of the Victoria Dock communicating with the main lines of the North Woolwich Railway for the conveyance of goods between the said dock and railway, provided that the dock company should have the right to use the said rails,

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trams, and railways in the ordinary course of their business. The Companies Clauses Consolidation Acts, the Lands Clauses Consolidation Acts, and the Harbours, Docks, and Piers Clauses Act, 1847, except so far as expressly varied, were incorporated in the London and St. Katharine Docks Act, 1864, but the Railways Clauses Consolidation Acts were not so incorporated.

By s. 146 of the London and St. Katharine Docks Act, 1864, it was provided that it should be lawful for the dock company, on the one hand, and the Great Eastern Railway Company, the London and North Western Railway Company, the North London Railway Company, the Great Northern Railway Company, the Midland Railway Company, and the Great Western Railway Company, or either of them, on the other hand, to enter into agreements with respect to the rates and charges to be levied by the dock company upon railway traffic using the said docks, and as to the making of any through rates and charges, and the division and apportionment thereof, and as to the facilities to be afforded to such traffic to and at such docks, and as to the use by the said railway companies of the railways, tramways, jetties, and other conveniences at the said docks. By s. 147 it was provided that it should be lawful for the before-mentioned railway companies respectively, with their carriages, wagons, and servants, to use free of charge the railways, tramways, and other conveniences at the London Dock and Victoria Dock, so as to enable them to convey goods and other traffic to and from the shipping there, subject only to such reasonable rules and regulations as the dock company might find it necessary in the public interest to make, and that the dock company should provide space at the Victoria Dock for the erection of offices by the before-mentioned railway companies for clerks, and for storage of sheets, ropes, and other necessary articles required by the said railway companies, or either of them, for the conduct of their business. The London and St. Katharine Docks Company were the owners of a line, which was a railway in the ordinary sense of the term, in the London Docks, which had belonged to the London Dock Company, but that railway was connected

with the London and Blackwall Railway Company, and had no connection with the lines in respect of which the application for through rates was made.

By the London and St. Katharine Docks Company Act, 1875 (38 & 39 Vict. c. cliii.), the London and St. Katharine Docks Company were authorized to construct an extension of the Victoria Dock called the Royal Albert Dock. By s. 2 of the Act the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, and the Harbours, Docks, and Piers Clauses Act, 1847, and s. 13 (under the heading "Protection to Navigation") of the Railways Clauses Act, 1863, except where expressly varied by the Act, were incorporated. By s. 4, sub-s. 5, of the Act the dock company were authorized to make, provide, and maintain, in connection with the works, all necessary or convenient locks, gates, graving docks, shipping places, wharves, quays, slips, jetties, landing places, stages, rails, trams, sidings, stations, platforms, ways, approaches, warehouses, sheds, buildings, cranes, hydraulic lifts, drops, gridirons, moorings, buoys, dolphins, culverts, gutters, drains, and other works and conveniences. The site of the works authorized by the Act included a portion of the North Woolwich Branch of the Great Eastern Railway Company, and s. 6 of the Act, so far as material, provided with regard thereto, in substance, as follows. It was provided that the dock company should construct, in substitution for a portion of the North Woolwich Branch about half a mile in length, a line passing under a part of the proposed dock in a tunnel, which tunnel was to be maintained and repaired by the dock company. The substituted line, when constructed, was to be vested in the Great Eastern Railway Company and to be deemed to be part of the North Woolwich Branch, but the soil over the tunnel was to remain vested in the dock company with the right to construct, maintain, and use over the tunnel such roads and other communications as they from time to time required for the purposes of their undertaking, but not so as to injure the tunnel or interfere with the traffic on the North Woolwich Branch. Upon the vesting of the substituted line in the Great Eastern Railway Company, the portion of the North Woolwich Branch line for

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which it was substituted, thereinafter referred to as "the transferred portion of the North Woolwich Branch," and the site thereof were to be vested in the dock company; and it was provided that the transferred portion of the North Woolwich Branch should, after the vesting thereof in the dock company, be maintained by the dock company to the reasonable satisfaction of the Great Eastern Railway Company in good and efficient repair and working order, so as to admit of the user thereof as thereinafter provided for traffic by the Great Eastern Railway Company, and all other companies lawfully entitled to the user of the substituted line, and also at all times for the goods traffic to and from the docks, but so nevertheless that the requisite alterations of the line, levels, gradients, and curves should be made to carry the transferred portion of the North Woolwich Branch over the swing bridge thereinafter mentioned. It was further provided that the dock company should with all convenient speed substitute for that part of the transferred portion of the North Woolwich Branch which it was necessary to remove for the construction of the dock extension a swing bridge as described in the section for carrying the railway over the dock extension; and that, if any accident should at any time prevent the use of the tunnel by which the substituted line was to be carried under the Victoria Dock extension, the Great Eastern Railway Company, and all other companies lawfully entitled to use the North Woolwich Branch, were to be entitled, free of charge, to use for the purposes of their traffic the transferred portion of the North Woolwich Branch until the tunnel should be again ready for the passage of such traffic, provided that the tunnel and substituted line should with all possible speed be restored or repaired so as to admit of the user thereof for traffic, and the right of the Great Eastern Railway Company and of such other companies to use the transferred portion of the North Woolwich Branch should continue only so long as should be reasonably required for the restoration and repair of the tunnel and substituted line.

By clause (*k*) of the 6th section it was provided that the dock company should either set apart such sidings, or should

allow the Great Eastern Railway Company upon the dock company's Victoria Dock estate to lay down free of charge and maintain such sidings as might be necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, wagons, and engines used for the purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension from or to the North Woolwich Branch, so as to render unnecessary the shunting or stopping of such trains, carriages, wagons, or engines on the North Woolwich Branch, and the dock company should permit any such sidings, whether set apart by them or laid down by the Great Eastern Railway Company, to be fully and freely worked and used by the last-mentioned company for dock traffic.

By the London and St. Katharine Docks Act, 1882 (47 & 48 Vict. c. ii.), the London and St. Katharine Docks Company were authorized to maintain and use a railway, which they had constructed on lands belonging to them, for the carriage of passengers from the North Woolwich Branch of the Great Eastern Railway to Galleons Reach at the entrance of the Royal Albert Docks, and were given power to take tolls as specified in the Act for the carriage thereon of passengers and small parcels, but were forbidden to carry thereon goods or merchandise other than parcels. Sect. 2 of that Act incorporated among other Acts the Railways Clauses Consolidation Act, 1845, and Parts I. and III. of the Railways Clauses Act, 1863. Sect. 26 of the Act empowered the dock company and the Great Eastern Railway Company, subject to the provisions of Part III. of the Railways Clauses Act, 1863, as varied by the Regulation of Railways Act, 1873, to make agreements with respect to the use and management by the two companies of their respective railway works, or any part or parts thereof, the management, regulation, interchange, collection, transmission, and delivery of traffic upon, or coming from, or destined for the railways and works of the two companies, or either of them, and the fixing, collection, payment, appropriation, and distribution of the tolls, charges, and profits arising from the respective railways and works of the two companies or either

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of them or any part thereof. Sect. 27 enacted that during the continuance of any agreement entered into under the preceding section with regard to the use and management by the two companies of their respective railways, certain provisions should take effect with regard to short distance tolls. The application did not relate to the passenger and parcel line mentioned in this Act.

Under the before-mentioned Acts of 1864 and 1875, relating to the Royal Victoria Dock and Royal Albert Dock, the London and St. Katharine Docks Company had constructed lines of rails in the Royal Victoria and Albert Docks forming a junction with the line of the Great Eastern Railway Company, and extending for a distance of three miles or thereabouts on either side of the docks to the various quays and warehouses of the docks. They had also under s. 6, clause (*k*), of the before-mentioned Act of 1875 constructed a large group of sidings known as the "Exchange Sidings" commencing at a distance of twenty-nine chains from the junction with the Great Eastern Railway. The total length of the dock lines and sidings constructed in the Royal Victoria and Albert Docks for the purpose of bringing goods traffic to and from the Great Eastern Railway was about forty-five miles. The application related to these last-mentioned lines and sidings. It appeared that, by arrangement between the dock company and the railway company, the goods traffic was carried to or from the quays and warehouses in the docks from or to the Great Eastern Railway Company's system in wagons and trucks belonging to the railway companies, the applicants having no rolling stock, but the applicants provided the locomotives for hauling the wagons and trucks in the docks. The applicants conveyed the traffic by means of their engines from all parts of the Victoria and Albert Docks to the Exchange sidings, and there placed the trucks containing it in train order on lines appropriated for the time to the traffic of the defendants and other railway companies respectively conveying traffic from the docks.

As regarded the construction of the before-mentioned lines of rails and sidings and the carrying out upon them of the

traffic referred to, the applicants claimed to be a railway company within the meaning of the Regulation of Railways Act, 1873, and entitled under that Act, as amended by the Railway and Canal Traffic Act, 1888, to apply to the Court of the Railway and Canal Commission for the order prayed for.

Under the terms of an agreement made April 18, 1864, between "the dock companies" of the one part and the London and North Western Railway Company, the Great Eastern Railway Company, and the Great Northern Railway Company of the other part, the applicants performed the service of loading the traffic and further services for the all-round sum of 1*s.* 5*d.* per ton, and the applicants were willing to submit to the order of the Court as proposed therein, under which the terms of the agreement were made applicable to the through rates proposed. There was a large volume of traffic landed *ex* ship on to the quays of the Royal Victoria and Albert Docks, and despatched thence, either direct or after warehousing in the applicants' warehouses, to stations on the Midland Railway. The defendants refused to quote through rates to be charged upon such traffic.

It was claimed by the applicants to be in the interest of the public that freighters should not be required to pay the rates published in the rate-books of the Midland Company at their Victoria Dock Station, including a charge for the service of cartage in London when no such service and no equivalent for such service was actually performed; and that through rates omitting charges for such services not rendered should be quoted for the traffic in question.

By their answers the Great Eastern Railway Company and the Midland Railway Company respectively alleged (inter alia) that the applicants were not a railway company, and that their lines to which the application referred were not a railway, within the meaning of the Railway and Canal Traffic Act, 1888.

Balfour Browne, K.C., *Freeman, K.C.*, and *Waghorn*, for the applicants. The applicants are a railway company, and entitled to through rates. Sects. 146 and 147 of the London and

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St. Katharine Docks Act, 1864, clearly recognise the use of the dock railways, and the London and St. Katharine Docks Company Act, 1875, by s. 4, sub-s. 5, and s. 6, clauses (*f*), (*k*) and (*g*), makes it abundantly plain that where dock railways are worked in the ordinary manner under powers, not optional, but compulsory, in connection with railway companies as part of a continuous route, they are to be regarded as railways within the scope of s. 25 of the Railway and Canal Traffic Act, 1888.

Cripps, K.C., Asquith, K.C., and *Moon*, for the defendants, the Midland Railway Company. The importance of the question as to whether the applicants are a railway company is very great, for, if the application be granted, the grouping of the whole of the London rates will be upset. The defendants' contention, therefore, is that, as regards through rates, a dock line is in a similar position to a private siding, and there can be no right of through rate in a private line. The applicants are not a railway company in connection with the lines over which this through rate is sought to be made: *East and West India Dock Co.* v. *Shaw, Savill and Albion Co.* (1)

It is essential to have dock sidings in order to deal with traffic; but the applicants are not a railway company when acting as a dock company. The through rate claimed here is not in respect of through traffic to and from a railway. Through traffic must be traffic from the siding of a railway constructed and carried on under the authority of an Act of Parliament. The applicants are not within the range of any Act.

[*In re East and West India Dock Co.* (2), *Great Northern Ry. Co.* v. *Tahourdin* (3), *In re Exmouth Dock Co.* (4), and *Manchester Ship Canal Co.* v. *Midland Ry. Co.* (5), were discussed.]

Moon, followed for the defendants, the Great Eastern Company.

Balfour Browne, K.C., replied.

Cur. adv. vult.

(1) (1888) 39 Ch. D. 524.
(2) (1888) 38 Ch. D. 576.
(3) (1883) 13 Q. B. D. 320.
(4) (1873) L. R. 17 Eq. 181.
(5) (1897) 10 Ry. & Can. Traff. Cas. 54.

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Dec. 13. WRIGHT J. This is an application by the London and India Docks Company against the Great Eastern Railway Company and the Midland Railway Company for through rates, and it alleges that the docks have been constructed under powers of Acts of Parliament; that under these Acts the applicants or their predecessors in title have constructed lines of a railway forming a junction with a railway of the Great Eastern Company, and extending for a distance of three miles on either side of the docks to various warehouses and quays, and, in particular, that they have constructed the exchange sidings, commencing about twenty-nine chains on the dock side from the junction with the Great Eastern Railway.

Then they quote the provision of the Act under which these sidings were constructed, and state that they, the dock company, convey traffic, by means of their own engines and servants, from all parts of the dock to the exchange sidings, and there place the trucks containing the traffic in train order on lines appropriated for the time to the traffic of the defendants, and of other railway companies conveying traffic from the docks. The total length of lines of railway within the dock property, for the purpose of bringing railway traffic to and from the Great Eastern Railway, is about forty-five miles. Then the applicants refer to an agreement of 1864, and then state the facts, and claim an order allowing a through rate with a particular apportionment.

To-day we have not to deal with any question of merits. We have merely to deal with the question of jurisdiction, and that is, put shortly, whether the dock company are for this purpose in the position of a railway company owning and working a railway. There is no doubt or question whatever but that for some purposes the dock company are a railway company. They have a very extensive system of railways on their dock estate. They are unquestionably a railway company for some purposes, and for some purposes of the Railway and Canal Traffic Acts. Under an Act of 1882 they own and work a passenger line in all respects under the same conditions under which ordinary passenger lines are owned and worked. They have been held to be a railway company under the

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Railway Companies Act, 1867 (Arrangements); and the decision holding them to be a railway company (*In re East and West India Dock Co.* (1)) has been recognised by Parliament in an Act which provided for the amalgamation of the dock companies, which enacted that the amalgamation should not deprive them of their status under that Act.

But the question is whether for this particular purpose of through rates they are in the position of a railway company within the meaning of s. 25 of the Railway and Canal Traffic Act, 1888. That section provides that every railway company owning or working railways which form part of a continuous line of railway or railway communication (I leave out about canals) shall afford all due and reasonable facilities, and so forth, and it goes on to enact that one of these facilities shall be the due and reasonable receiving, forwarding, and delivering by every railway company at the request of every other such company all through traffic to and from the railway of any other such company at through rates, tolls, or fares, and also the due and reasonable receiving, forwarding, and delivering by every railway company at the request of any person interested in through traffic at through rates.

Now, in determining whether the dock company are within that enactment, there are many things to be considered. There are two categories, under either of which the dock company might be supposed to come. First of all, there may be a dock system in which there are laid down in the docks railways which may be called simply dock railways—domestic railways for the purpose of the dock traffic within the docks, constructed under general powers to do what is necessary for the work of the docks, and merely, as it were, by chance connected at the dock gates with some external railway.

In a case like that it may be that there would be some purpose under the Railway and Canal Traffic Acts, with regard to which we should have jurisdiction over them as railway companies, but hardly, I think, in relation to the 25th section of the Traffic Act of 1888 as regards through tolls and rates. It is not necessary to express any opinion whether we should

(1) 38 Ch. D. 576.

have jurisdiction in a case of that kind. In the other category would fall a dock company whose property includes railways or portions of railways, forming in fact a continuation of general railway systems outside the dock estate connecting the dock railways with those railways as part of one continuous system, and appropriated for that purpose by the statute.

It is within the latter category that, as it seems to me, the dock company comes. First of all, by the London and St. Katharine Docks Act, 1864, s. 146, it was provided that it might be lawful for a dock company and a railway company to enter into agreements with respect to the rates and charges to be levied by the dock company upon railway traffic using the docks, and as to the making of through rates and charges, and the division and apportionment thereof, and as to the facilities to be afforded. If that section stood alone it would probably not be enough to make the dock railway a continuation of the railways outside. Then comes s. 147, which says, "It shall be lawful for the Great Eastern," and railway companies there specified, "with their carriages, waggons, and servants, to use free of charge the railways, tramways, and other conveniences at the London Dock and the Victoria Dock, so as to enable them to convey goods and other traffic to and from the shipping there, subject only to such reasonable rules and regulations as the company may find it necessary in the public interest to make"; and the dock company shall provide space for offices for the company, and for storage and so forth. Now, if that were the whole of the matter, I should be very much inclined to think it brought the dock company's railways within the scope of the Traffic Act of 1888, because it gives an absolute right for the railway companies named to use these dock railways as a continuation of their own system, subject to reasonable rules and regulations in the public interest.

The matter does not rest there, nor does it rest merely on those two sections coupled with the agreement which was made during the passing of the Act of 1864, by which a right was given to the railway companies to exercise their powers on the terms mentioned in the agreement. It does not rest there, because there comes next the London and St. Katharine Docks

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Company Act of 1875. By that Act s. 6, clause (*f*), the dock company are constituted proprietors of a branch called the North Woolwich Branch, and in relation to that branch it seems to me they would unquestionably be a railway company for all the purposes of any traffic which passed from outside systems over that branch; but I do not understand that that is the case in this instance. Then in the same section there is clause (*k*), which provides, leaving out immaterial words, that "the [dock] company shall set apart such sidings"—there is an alternative given which has not been adopted—"as may be necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, waggons, and engines, used for the purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension from or to the North Woolwich Branch, so as to render unnecessary the shunting or stopping of such trains, carriages, waggons, or engines on the North Woolwich Branch; and the company shall permit any such sidings, whether set apart by them or laid down by the Great Eastern Company, to be fully and freely worked and used by the last-mentioned company for dock traffic." Now, it seems to me that the proper conclusion is, that under these various powers and regulations the dock company's railways, which are worked in the ordinary manner with locomotives and so forth as if they were ordinary railways, and are worked under powers, not optional, but compulsory, on the dock company, in connection with the system of the Great Eastern Railway Company, must be regarded as railways within the scope of s. 25 of the Traffic Act, 1888. I do not see what element is wanting. They are unquestionably railways. The railways are owned and worked by the dock company; they are so owned and worked under parliamentary authority, and are part of one continuous route from the system of the Great Eastern Railway Company to the quay sides. At any rate, they are part of the continuous route from the system of the Great Eastern Railway Company to a long way within the dock boundary, namely, the exchange sidings—a distance of twenty-nine chains: that part seems to me to be unquestionably part of one continuous system of railway communication.

I do not think it is necessary to say whether the rest of the dock railways reached from the Great Eastern system viâ the exchange sidings are in the same sense part of the continuation of the general railway system or not; but at any rate, as regards that portion of the exchange sidings, it seems to me the section is applicable, and that is enough to make the dock company interested in a portion of the route, which route consists of the Great Eastern Railway system, and of this portion of the exchange siding in combination. It is said there are no statutory tolls. That is quite true. There are no statutory regulation tolls or rates chargeable by the dock company for the use of this railway, although there is a statutory regulation of the maximum tolls and rates which they can charge for all dock services; but the Railway and Canal Traffic Acts do not provide, either in the definition of a railway company or elsewhere, that the existence of a statutory regulation of tolls or rates shall be essential as a condition for the application of the Act.

Then it is said no returns are made to the Board of Trade, and no provisional order was issued by the Board of Trade or passed by Parliament in relation to the dock company. There may be reasons for that, or it may have been a slip on the part of the Board of Trade. That cannot govern the construction of the section. For these reasons I am of opinion that the dock company are a railway company, not merely for some purposes, but for this particular purpose, and that the application is well founded in that respect.

SIR FREDERICK PEEL. This is an application to us to order through rates proposed to the Midland and the Great Eastern Railway Companies by the London and India Docks Company for traffic from the Victoria and Albert Dock viâ the dock company's lines of railway to stations on the Midland Railway. The question is whether these dock lines are a railway within the meaning of s. 25 of the Railway and Canal Traffic Act, 1888, which described the traffic a railway company may be required to forward at through rates as traffic arriving by the railway of another railway company. Now, a railway for this

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purpose must be one constructed or carried on under the powers of an Act of Parliament, and I am inclined to think that the dock company's portion of the through route is not a railway of that sort. The three Dock Acts of 1853, 1864, and 1875 are the material we have for judging of this. The Act of 1853 required the dock company to permit the Eastern Counties Railway Company to lay down railways at the intended Victoria Dock, but gave the dock company itself power only to make tramways in connection with the dock; and the Act of 1864, which transferred the Victoria Dock estate to the London and St. Katharine Docks Company, while it authorized the Great Eastern and Midland and other railway companies to use the railways, tramways, and conveniences at the London Dock and the Victoria Dock, left the powers of the dock company for constructing or carrying on railways as they stood under the previous Acts. Then, under the provisions of the Act of 1875 for the extension of the Victoria Dock, the dock company are either to set aside for the use of the Great Eastern Company, or to allow that company to lay down upon the Victoria Dock estate, such sidings as may be necessary for the accommodation of trains with traffic passing between the Victoria Dock extension and the Great Eastern Railway Company's North Woolwich Branch, so as to dispense with any shunting of trains on that branch. In the execution of this Act the dock company appear to have constructed on their dock estate large sidings for the exchange of traffic, having a junction at one end with the North Woolwich Branch and connecting at the other end with the docks.

By agreement with the Great Eastern and other railway companies they work the dock railway traffic over these lines to and from the exchange sidings to which the railway companies come to receive and forward or deliver it, as the case may be. The sidings and lines so made by the dock company are their portion of the proposed through route, and the question is, I think, Does the direction to set apart sidings for dock railway traffic make the sidings so set apart a railway, and the company providing or owning them a railway company? It seems to me that it does not, because the sidings

which the dock company are directed to set apart refer, I think, to the sidings which by s. 4 of the Act of 1875 they are authorized to make in connection with the Victoria Dock extension; and unless these sidings are a railway, I do not think the setting them apart for Great Eastern Railway traffic would make them such. The various works, however, authorized by s. 4 are evidently allowed as works incidental to and an integral part of the dock undertaking, and the company's position in relation to them is that of a dock company only. In other respects the applicants have none of the grounds for being regarded as a railway company, which in the case of the Manchester Ship Canal (1) led us to regard that company as a railway company competent to propose through rates to and from their docks; and on the whole I think the through rates so proposed by the applicants cannot be granted.

VISCOUNT COBHAM. So far as I have been able to form an opinion on the difficult points of law and construction which are involved in this case, it is in accordance with that of the learned judge, and I shall not attempt to add anything to what he has said.

Judgment for applicants.

J. F. C.

The railway companies appealed.

Moon (*Cripps, K.C.*, and *Asquith, K.C.*, with him), for the railway companies. In order that the applicants should be entitled to a through rate as claimed by them under s. 25 of the Railway and Canal Traffic Act, 1888, it is essential for them to shew that they are a "railway company" and that their lines are a "railway" which forms with another railway or railways a continuous line of railway communication. The Railway and Canal Traffic Act, 1888, is to be construed as one with the Regulation of Railways Act, 1873. By s. 3 of that Act the term "railway company" includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any

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Act of Parliament, and the term "railway" includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic. The latter definition merely includes in the term "railway" stations, sidings, wharves, or docks belonging to a railway, but does not make the things enumerated railways, if there is no railway to which they belong. Therefore, unless the applicants are a railway company, and unless they possess a "railway" to which their sidings belong, this latter definition carries their case no further. It is submitted that the terms "railway" and "railway company," as used in the Railway and Canal Traffic Act, 1888, mean "railway" and "railway company" in the ordinary legal sense of the terms. They refer to railways to which the ordinary railway legislation applies, such as the Railways Clauses Consolidation Acts, and the provisions of s. 24 of the Railway and Canal Traffic Act, 1888, with regard to the classification of merchandise traffic and maximum rates and tolls. Such legislation has no application to lines or tramways laid down by a dock company for the purpose of the business of their docks, even though they may be laid down and used under statutory powers. The dock company do not hold themselves out as public carriers of goods traffic from one part of their dock to another. They have no rates for the carriage of such traffic. The dock company's lines do not form a continuous line of railway communication with the Great Eastern Railway within the meaning of s. 25. That section contemplates cases where there is a continuous line of railway communication between stations on different railways. The fact that the applicants, as successors of the London Dock Company, own a railway properly so called, in connection with the London Docks, has no bearing on the case, for that railway is a long way off the lines here in question, and has no connection with the through rates claimed by the applicants. Assuming that the dock company are a railway company as regards that railway, that would not constitute them a railway company for the purposes of the present application. The same considerations apply to the line for passengers and parcels authorized by the London and St. Katharine Docks Act, 1882.

The dock company have no power to carry goods other than parcels on that line, and the present application has really nothing to do with it. The power given to the dock company by the London and St. Katharine Docks Act, 1864, is to construct "tramways" and such works as are contemplated by the Harbours, Docks, and Piers Clauses Act, 1847. "Railways" are not mentioned among the works authorized. The term "railways" no doubt occurs in ss. 146 and 147 of the Act, but the use of that expression could not of itself make into a railway for the purposes of s. 25 that which would not otherwise be a railway for those purposes, and the use of the term is explained by the fact that the London Dock Company owned a railway in the proper sense of the term elsewhere.

It is to be observed that the Railways Clauses Consolidation Acts are not incorporated by that Act, nor by the London and St. Katharine Docks Act, 1875. The description of the works authorized by s. 4 of the latter Act does not point to a railway properly so called, but only to tramways and other works necessary or convenient for dock purposes, and such as are contemplated by the Harbours, Docks, and Piers Clauses Act, 1847. The effect of the arrangement under s. 6 of the Act of 1875 between the dock company and the Great Eastern Railway Company with regard to "the transferred portion of the North Woolwich Branch" is not to make the dock company a "railway company" in respect of that portion of line. No power was transferred to them of charging tolls for the use of it. The scope of the arrangement is that it became, in substance, a portion of the system of the dock tramways, subject to a reservation to the railway company of a power to use it in case of an accident temporarily preventing the use of the substituted line through the tunnel. The provisions of s. 6, clause (*k*), with regard to the setting apart of sidings by the dock company for the traffic passing on to the railway cannot have the effect of making the dock company a railway company or the sidings a railway for the present purpose. If the Great Eastern Company had made these sidings, they would have belonged to their railway, but the dock company has no railway to which they can belong. Sects. 26 and 27 of the

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London and St. Katharine Docks Act, 1882, speak of the dock company's "railway," but the term "railway" is there used in reference to the passenger and parcel line mentioned in that Act, with which the present application has nothing to do. The decision in *In re East and West India Dock Co.* (1) has no bearing on this case. The railway owned by the East and West India Dock Company to which that case related has nothing to do with the lines in respect of which the present application is made. [He also cited *East and West India Dock Co.* v. *Shaw, Savill and Albion Co.* (2); *Manchester Ship Canal Co.* v. *Midland Ry. Co.* (3); *Williams* v. *London and North Western Ry. Co.* (4)]

Balfour Browne, K.C., and *Waghorn* (*Freeman, K.C.*, with them), for the applicants. It is submitted that the majority of the Railway Commissioners were right in holding that, where, as in the present case, a dock company constituted by statute owns lines which are connected with a railway outside the docks, so as to form one continuous system of railway communication between places on the railway and the quays and warehouses of the dock, and those lines are by statute appropriated for that purpose, the dock company are a railway company and their lines and sidings are a railway within the meaning of s. 25 of the Railway and Canal Traffic Act, 1888. The applicants are undoubtedly a railway company for some purposes, for they own two public railways, which are railways in the fullest sense of the term, namely, the railway which formerly belonged to the London Dock Company, connected with the London and Blackwall Railway, and the passenger and parcel line to Galleons Reach. These, however, are not the lines in respect of which the application is made. By the London and St. Katharine Docks Act, 1864, the dock company were given power to make lines in the docks connecting with the Great Eastern Company's line, and by s. 146 they were authorized to make agreements with that company with respect to the rates and charges to be levied by the dock company upon railway traffic using the docks, and as to the

(1) 38 Ch. D. 576.
(2) 39 Ch. D. 524.
(3) 10 Ry. & Can. Traff. Cas. 54.
(4) [1900] 1 Q. B. 760.

making of through rates and charges, and the division and apportionment thereof, and as to the facilities to be afforded. By s. 147 the railway company were given the right to use free of charge the railways, tramways, and other conveniences at the London and the Victoria Dock, so as to enable them to convey goods and traffic to and from the shipping there, subject only to such reasonable rules and regulations as the dock company might find it necessary in the public interest to make. The applicants are, in respect of the lines referred to by that Act, the owners of railways constructed and carried on under the powers of an Act of Parliament for the purposes of public traffic. Then, again, in respect of "the transferred portion of the North Woolwich Branch," which was vested in the applicants under the 6th section of the London and St. Katharine Docks Act, 1875, the applicants are clearly within the definition of a "railway company" given by the Regulation of Railways Act, 1873. That piece of line formed a portion of a statutory railway, and is still to be used for the traffic of the North Woolwich Branch of the Great Eastern Railway Company, whenever the substituted line is blocked by an accident in the tunnel. The "exchange sidings" are connected with that portion of the railway and the applicants' lines communicating with the Great Eastern Railway Company's railway: and it is submitted that they come within the definition of "railway" given by s. 3 of the Regulation of Railways Act, 1873. These lines and sidings belong to the dock company. They are worked and carried on under the powers of an Act of Parliament for the purposes of railway traffic, and form with the Great Eastern Railway a continuous line of railway communication. The whole of the exchange sidings are used for railway traffic to and from the docks. It is not essential for the purpose of bringing the case within s. 25 of the Railway and Canal Traffic Act, 1888, that the dock company should have the power of charging tolls for the use of their lines as distinguished from the statutory tolls which they are authorized by their Acts to take for the use of their docks and dock services generally.

Moon, in reply.

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COLLINS M.R. This is an application by the London and India Docks Company, in the capacity of a "railway company," under s. 25 of the Railway and Canal Traffic Act, 1888, for through rates in respect of traffic passing from the quays and warehouses in the Royal Victoria and Royal Albert Docks over the railway of the Great Eastern Railway Company to certain places on the system of the Midland Railway Company.

Sect. 25 of the Railway and Canal Traffic Act, 1888, leaving out matters not material to the present point, recites that it is enacted by the Railway and Canal Traffic Act, 1854 (among other things), that every railway company having or working railways, which form part of a continuous line of railway communication, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways all the traffic arriving by the other, without any unreasonable delay, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may by means of the railways of the several companies be at all times afforded to the public in that behalf. The section then proceeds to enact that, subject as thereinafter mentioned, the said facilities to be so afforded shall include the due and reasonable receiving, forwarding, and delivering by every railway company, "at the request of any other such company," i.e., of another railway company, of through traffic to and from the railway of any other such company at through rates.

In order, therefore, to bring themselves within the section, the applicants must shew that they are a railway company, and that they are claiming through rates from a railway company whose railway forms with theirs a continuous line of railway communication. The section presupposes the existence of a railway which can reasonably be regarded as forming part of a continuous line of railway communication between a place on that railway and a place on another railway which forms the other part of that line of communication.

The applicants are a dock company, which came into existence, and exists, under statutory provisions, for the purpose of making and working docks; and, as incident to that purpose,

they were invested with statutory powers of laying down and using rails and tramways among other appliances ancillary to the working of their docks. I do not propose to go through all the clauses of the various Acts, which have been referred to by the counsel for the appellants; but, with regard to the statutory provisions relating to the lines in respect of which the application is made, I may say generally that we do not find in them those provisions which one would expect to find on the assumption that the Legislature intended to constitute the applicants a railway company in respect of those lines. The Railways Clauses Consolidation Acts do not appear to be incorporated in the dock company's Acts, except for purposes which have no relation to the lines involved in this case. This fact seems to me to throw a strong light on the meaning of the legislation on the subject, as tending to shew that the applicants must in respect of these lines of rails be regarded as a dock company with the ordinary incidents of such a company, and not as a railway company.

It was argued that the applicants in this case come within the definition of a "railway company" given by s. 3 of the Regulation of Railways Act, 1873, which provides that in that Act the term "railway company" includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament, and that the term "railway" includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic.

In order to bring a company within the definition of a "railway company," I think there must, to begin with, be a railway constructed or carried on under the powers of an Act of Parliament; for, with regard to the definition of a "railway" given further on in the section, it appears to me that, though it is true that the term "railway" is to include, among other things, a siding, nevertheless, a siding which is not otherwise part of a railway is not made to constitute a railway of itself. Though there be a siding which is used as a siding under statutory powers, I do not think it will be within the definition, unless it belongs to a railway. One must find a railway before one can

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say that a siding is part of it. The question is whether, having regard to the definition in the Act of 1873, the provisions of s. 25 of the Railway and Canal Traffic Act, 1888, apply to this case.

In the present case the through route suggested, as the route in respect of which through rates are demanded by the applicants, is one from the quays and warehouses in the Royal Victoria and Royal Albert Docks to the exchange sidings, and thence over the line of the Great Eastern Railway Company on to the line of the Midland Railway Company. In order that the applicants may succeed, they must make out that the various lines over which this route passes respectively form part of one continuous line of railway communication. The applicants' share of the suggested route is simply composed of the lines laid down about their docks. In my opinion these lines cannot reasonably be said to form part of a continuous railway route from any place to any other place within the meaning of the Railway and Canal Traffic Act, 1888. They are the lines by which the business of the docks is carried on, and it seems to me contrary to the ordinary meaning of words, to say that these lines, which constitute the usual means of moving goods about the docks, are part of a through railway route or, in the words of the Act, a continuous line of railway communication from one place to another. They are not, as it seems to me, brought into existence for that purpose, but for the purpose of facilitating the moving of goods from one part of the docks to another. I do not think they form part of a continuous railway route which can be made the subject of a through rate. Looked at broadly, I think the dock, with its appliances, may be regarded for the present purpose as analogous to a larger terminal station on a railway, and the lines as appliances for moving traffic about to and fro in the station, and not as part of the line of railway communication. I think that, if the counsel for the applicants had been obliged to rely on these dock lines and sidings only, he would have had great difficulty in contending that the applicants were a "railway company" for the purposes of s. 25 of the Act.

It appears, however, that, the dock company having been

made up by the amalgamation of several dock companies, they possess different docks, to some of which railways in the full sense of the term are annexed. It was argued that, in the capacity of owners of those railways, independently of the before-mentioned lines and sidings, they could claim to be in the position of a railway company for the purposes of s. 25. The applicants were able to point to two perfectly independent railways which belong to them, namely, the passenger and parcel railway in the Royal Albert Dock and the railway which formerly belonged to the London Dock Company. The first of these railways appears to me to have nothing to do with the point now under discussion, not being made part of the route in respect of which the through rates are demanded, for the very good reason that there is only power to carry passengers and small parcels upon it. Similarly, with regard to the railway which belonged to the London Dock Company, I do not see how the fact that the applicants are the owners of a railway elsewhere, to which the present application does not relate, can have anything to do with the discussion. The counsel for the applicants did not insist very strongly on the suggestion that they were a railway company in respect of these railways, and he was obliged to fall back on another point, which was really the only point that ultimately he strongly pressed, namely, that the applicants were within the 25th section by reason of their ownership of what has been called "the transferred portion of the North Woolwich Branch." The facts with regard to that are as follows.

When the Royal Albert Dock was being constructed, it was found that it would interfere with the existing line of the Great Eastern Railway Company, which ran across part of the site of the proposed dock. Thereupon it was provided that a portion of the line of that company should be carried under part of the site of the proposed dock in a tunnel, but that the old line should be left in its former position, subject to certain alterations necessary for the purpose of carrying it over a part of the dock by a swing bridge; and it was arranged that this line should be transferred to the dock company, the Great Eastern Railway Company, however, retaining the right of temporarily

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running trains over it under special circumstances, and the dock company having the general right of using it for dock purposes like the rest of their tramways. It was argued that the applicants were a railway company within the meaning of s. 25, because they were, in respect of this bit of line, the owners of what was part of a fully constituted railway. To begin with, I do not think that, as owners of that bit of line, the applicants can be said to be a "railway company" owning a "railway" in the proper sense of the term. It seems to me that that bit of line has been denuded of the essential characteristics of a railway for the present purpose. The dock company have no power of charging tolls in respect of it, and their possession of it, so far as they are concerned, is for the purpose of using it as the rest of the tramways in their docks are used. Therefore it appears to me to have been taken out of the category of a "railway" in the proper sense of the term, and to stand in a different position now from that in which it formerly stood; and, consequently, the applicants cannot be treated in reference to their ownership of that bit of line as being a company owning a railway in the sense in which the term is used in the Regulation of Railways Act, 1873. Nor do I think that, even if the applicants could claim to be within the definition of a "railway company" as regards this particular bit of line, they could avail themselves of that position for the purposes of the present application. They can only demand a through rate in respect of a continuous line of railway communication, but most of the route to which their application relates has no connection whatever with this particular bit of line. The traffic on the north side of the docks would not pass over it, and only a portion of the traffic on the south side of the docks would pass over a little piece of it. The counsel for the applicants sought to make this bit of line available in this way. He said that, this bit of railway being owned by the applicants, they were entitled to treat all the sidings and the approaches to it as part of a railway. It seem to me, however, that it is not reasonable to treat all the rest of the lines and sidings as ancillary to that bit of railway. I think that, as I have said, that bit of railway has really become merged in the system of

lines used for dock purposes, subject to the use of it by the railway company temporarily in case of an emergency, and stands now in the category of a dock tramway; and the sidings of themselves cannot constitute a railway. Their existence could only be material, if there were already existing a railway of which they could be said to be part. On these grounds I think that the applicants have failed to shew anything in the nature of a through route, part of which passes over their lines, and that they are not a "railway company" in the sense in which that term is used in the Railway and Canal Traffic Act, 1888, s. 25. It is said that there has been a decision of the Railway Commissioners which concludes this case, namely, *Manchester Ship Canal Co.* v. *Midland Ry. Co.* (1) I was a party to the decision in that case; and I think that, instead of being an authority in favour of the applicants, it is really one against them. It was decided in favour of the applicants solely upon grounds which do not exist in the present case, and but for their existence the decision must have been the other way. In that case there were special provisions by which the ship canal company had power to charge tolls, and other statutory provisions which in the opinion of the Railway Commissioners put the company in the position of a railway company for the purposes of the application, and therefore there was jurisdiction to make the order for which the company applied. That was an extreme case decided on very special circumstances which do not exist here, and, whether rightly or wrongly decided, it does not appear to me to be an authority for the present case. I think that Sir Frederick Peel has taken the right view in this case, and I cannot agree with the view taken by the other members of the Railway Commission.

MATHEW L.J. I am of the same opinion. Sect. 25 of the Railway and Canal Traffic Act, 1888, as explained by reference to the provisions of the Regulation of Railways Act, 1873, contemplates a continuous line of railway communication, of which part belongs to one railway company and part to another. The question is whether that section applies to the circumstances

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of the present case. It is contended that certain tramways, worked by steam, which are used for the purposes of the traffic within the applicants' docks, are a railway within the meaning of the Railway and Canal Traffic Act, 1888. I do not think that they are such a railway. These lines are not, in my opinion, part of a continuous line of railway communication from a place on one railway to a place on another railway, but are merely appliances provided for carrying on the business of the docks. It was urged by counsel, as a ground for holding the applicants to be a "railway company" and their lines to be a "railway," that the applicants were the owners of "the transferred portion of the North Woolwich Branch," which was originally part of a fully constituted railway; that that piece of line still retained the position of a "railway"; and that the lines and sidings in question must be treated as belonging to that railway. I am unable to accept the contention that this portion of line still retains the character of a railway. It appears to me that it has been practically merged in the system of tramways used for dock purposes. That being so, I think it is impossible to contend that the dock sidings, taken by themselves, and in the absence of any railway to which they belong, are a "railway" which is owned by the applicants as a "railway company" within the meaning of the Regulation of Railways Act, 1873, and the Railway and Canal Traffic Act, 1888. For these reasons I agree that the appeal should be allowed. (1)

Appeal allowed.

Solicitors for applicants: *Turner, Son & Foley.*
Solicitor for Great Eastern Railway Company: *E. Moore.*
Solicitors for Midland Railway Company: *Beale & Co.*

(1) The case was heard by consent before two members of the Court of Appeal.

E. L.

[IN THE COURT OF APPEAL.]

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Jan. 29;
Feb. 19.

STEIN AND ANOTHER *v.* POPE.

Bankruptcy—Landlord and Tenant—Assignment of Lease by Lessee—Act of Bankruptcy by Lessee—Relation back of Bankruptcy—Liability of Assignee for Rent due before Adjudication of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 43, 44, 54.

The lessee of premises assigned the lease with other property to the defendant by a deed which was an act of bankruptcy. The lessee was subsequently adjudicated bankrupt on that act of bankruptcy, and a trustee in bankruptcy was appointed, who disclaimed the lease. During the interval between the assignment of the lease and the date of the lessee's being adjudicated bankrupt, two quarters' rent of the premises accrued due under the lease. Before the lessee's bankruptcy the plaintiffs, who were the owners of the reversion upon the lease, sued the defendant, and recovered judgment against him, for the first quarter's rent. They had commenced an action for the second quarter's rent, when the lessee was adjudicated bankrupt, but the action did not come on for trial until after the adjudication:—

Held, that the defendant was liable for the rent, notwithstanding that the bankruptcy of the lessee had relation back to the act of bankruptcy.

APPEAL from the judgment of Darling J. in an action tried before him without a jury.

The action was brought by the plaintiffs, as owners of the reversion upon the leases of two dwelling-houses, against the defendant, as assignee of the leases, to recover the sum of 32*l.* 10*s.*, the amount of a quarter's rent of the houses due at Michaelmas, 1900. The leases were originally granted to one Mrs. Bates. On May 31, 1900, she executed a deed, by which she assigned her property, including the leases, to the defendant on trusts for the benefit of her creditors. On August 3 judgment was obtained by the plaintiffs against the defendant in an action for the quarter's rent of the houses due at Midsummer. On August 27 a bankruptcy petition was presented against the lessee, the act of bankruptcy alleged being the assignment for the benefit of creditors on May 31. On September 27 a receiving order was made upon the petition. On October 1 the action was commenced for the quarter's rent due on September 29. On October 18 the lessee was adjudicated

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bankrupt, and on October 26 a trustee in bankruptcy was appointed who disclaimed the leases. The action subsequently came on for trial, when Darling J. gave judgment for the plaintiffs for the rent claimed.

F. Cooper Willis, and *Roskill*, for the defendant. The deed by which the leases were assigned to the defendant was an act of bankruptcy; and, after the adjudication of bankruptcy against the lessee founded upon that act of bankruptcy, the leases became vested, subject to the right of disclaimer, in her trustee in bankruptcy, whose title, by virtue of s. 43 of the Bankruptcy Act, 1883, had relation back to the act of bankruptcy, so as to avoid the assignment of the lease to the defendant as from that date. The result is that the defendant cannot now be considered as the assignee of the leases at the time when the rent accrued due, and therefore is not liable for it. Whatever became of the term upon the disclaimer of the trustee in bankruptcy, it did not revest in the defendant.

[They cited *Titterton* v. *Cooper* (1); *Carr* v. *Acraman* (2); *Doe* d. *Lloyd* v. *Powell*. (3)]

H. Reed, K.C., and *C. C. Scott*, for the plaintiffs. In this case the rent sued for became due, and the right to recover it had vested in the plaintiffs, before the bankruptcy of the lessee. At the date when the rent sued for accrued due, the defendant could have had no defence to an action for it. It is submitted that the subsequent bankruptcy of the lessee cannot have the effect of divesting the right of the plaintiffs to recover the rent from the defendant which had already accrued. Sect. 4 of the Bankruptcy Act, 1883, enacts that such an assignment as that which comprised the leases in this case shall be an act of bankruptcy, but there is no provision that it shall be void for all purposes. Sect. 43 of the Act provides that the bankruptcy shall have relation back to the act of bankruptcy. The effect is that a person, who, like the defendant, has taken an assignment of property with knowledge that it is an act of bankruptcy, must disgorge the property assigned, which becomes applicable for the

(1) (1882) 9 Q. B. D. 473. (2) (1856) 11 Ex. 566.
(3) (1826) 5 B. & C. 308; 29 R. R. 253.

benefit of the creditors under s. 44; but it does not follow that the assignment is void for all purposes. It is only voidable so far as is necessary in the interests of creditors and for the purposes of the bankruptcy. The title of the trustee in bankruptcy does not arise till his appointment: see Bankruptcy Act, 1883, s. 54; and he is not personally liable for rent accruing due before his appointment: *Titterton* v. *Cooper*. (1) The effect of s. 54 is as if, upon the appointment of the trustee in bankruptcy, there had been a conveyance to him of the term; but such a conveyance could not divest the right of the plaintiffs to the rent already accrued due to them from the defendant. The result of the provisions of the Bankruptcy Act, 1883, is that the assignee under a conveyance which is an act of bankruptcy must give up the property to the trustee in bankruptcy, for the benefit of the creditors, but the trustee in bankruptcy does not become assignee of the term as from the date of the act of bankruptcy. *Carr* v. *Acraman* (2) is strongly in favour of the plaintiffs.

F. Cooper Willis, in reply.

Cur. adv. vult.

Feb. 19. ROMER L.J. read the following judgment:—The plaintiffs are in the position of lessors of certain houses. The lessee, Mrs. Bates, assigned her leases of these houses (with other property) to the defendant by a deed which was an act of bankruptcy on her part. After the assignment, and before the bankruptcy of the lessee, some rent accrued due under the leases in respect of the houses, and the plaintiffs issued the writ in this action for that rent against the defendant. But subsequently, and before the action came on for trial, the lessee was made bankrupt, and the bankruptcy had relation back to the above-mentioned act of bankruptcy. The trustee in bankruptcy then disclaimed the leases. Under these circumstances the question arises whether the defendant is liable for the rent.

I do not think it necessary in dealing with this case to consider the question as to the effect of the disclaimer, for it

(1) 9 Q. B. D. 473. (2) 11 Ex. 566.

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appears to me that the defendant is liable for the rent, whatever the effect of the disclaimer may be. It is not, and could not be, disputed that, although the assignment to the defendant was an act of bankruptcy, that fact did not at the time the rent accrued due prevent the defendant from being liable for the rent at the time it accrued due. The assignment at that time stood unimpeached, and could not be impeached, as between the assignor and assignee, and the plaintiffs, as lessors, were entitled to enforce payment of the rent as against the defendant. If at the time the action was brought it had come on at once for trial, the defendant would have had no defence, and judgment must have been given for the plaintiffs. This is not disputed on behalf of the defendant, but it is said for him that, owing to the circumstance that the action came on for trial subsequently to the bankruptcy, that lucky fact freed him from his existing liability, because the assignment had by the bankruptcy become void as against the trustee in bankruptcy. In my judgment, the bankruptcy had not the effect of releasing the existing liability for the rent as between the defendant and the plaintiffs, and the delay in the action coming on for trial had not the effect contended for on behalf of the defendant. The bankruptcy, following on the act of bankruptcy, had, no doubt, the effect of making the assignment invalid as against the trustee and the creditors and for all purposes connected with the administration of the lessee's estate in bankruptcy: and in any question as between the lessors and the trustee in bankruptcy the former could not have insisted on the validity of the assignment: see *Doe* d. *Lloyd* v. *Powell* (1), where in a somewhat similar case the lessors were seeking to establish as against the assignees in bankruptcy that the assignment had operated as a forfeiture of the lease. But in the present case it is not in any way necessary, in order to give the fullest effect to the rights of the trustee and creditors in the bankruptcy, to hold that by the bankruptcy the defendant has been released from his liability to the plaintiffs. The bankruptcy provisions, which made the assignment an act of bankruptcy and the assignment invalid

(1) 5 B. & C. 308; 29 R. R. 253.

in bankruptcy, are not provisions for the benefit of the defendant. As a general rule bankruptcy does not affect the rights and liabilities of persons not parties to the bankruptcy, except so far as may be necessary in the interests of the trustee and creditors and the administration of the bankrupt's estate in bankruptcy. Here it is in no wise necessary in such interests to hold that the bankruptcy has freed the defendant from his liability to the plaintiffs. It would indeed be a strange result if the defendant, who was party to the act of bankruptcy, could avail himself of that fact and of the subsequent bankruptcy, in order to free himself from liability to the plaintiffs, who were no parties to the act of bankruptcy. In my opinion the Court is not bound to arrive at any such result in this case. If, indeed, the effect of the bankruptcy had been to vest the lease in the trustee in such a way as (apart from the right to disclaim) to make him directly liable as assignee for the rent in question to the plaintiffs, there might be a difficulty in the plaintiffs' way. For it might then be said on behalf of the defendant that there could not at one and the same time be two persons claiming through the lessee directly liable by privity of estate for the rent. But the bankruptcy had no such effect. Even if there had been no disclaimer, the trustee would not have become liable for any rent which accrued due before his appointment: see *Titterton* v. *Cooper*. (1) It appears to me, therefore, that the defendant has not been released or discharged from his liability by the subsequent bankruptcy. At the time the rent accrued due the defendant was assignee of the lease and bound to pay the rent, and he has not escaped from his liability by his delay in payment. If he had paid the rent when it accrued due, as he ought to have done, without any action brought by the plaintiffs, he could not upon the bankruptcy have demanded repayment on the ground that no rent was due and that he had paid owing to a mistake of fact—namely, the existence of an assignment to him of the lease. To hold the defendant not liable in this case would lead to strange results. By reason of the action of the defendant in taking the assignment of the lease the plaintiffs would naturally

(1) 9 Q. B. D. 473.

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be led to look to him for payment of the rent accruing during the assignment, and might thereby, and by the defendant's delay in payment, have delayed proceedings against the lessee which might have resulted in recovery of the rent from the lessee; and yet the defendant, if he escaped liability, must say that his being party to an act of bankruptcy and his delay in payment have enabled him to throw the loss thereby occasioned on the plaintiffs who were perfectly innocent parties; and, further, this case could not be distinguished from the case where the bankrupt was not an original lessee, but was herself only an assignee, and in that case after the assignment by her the lessors could not have sued her, but could only have sued the assignee, or the lessee, who might not have been worth suing. In my judgment, the appeal fails and should be dismissed with costs.

COLLINS M.R. I agree in the result; but I desire to reserve my opinion as to what the rights would have been between the parties had bankruptcy supervened before any action had been taken by the lessors against the assignee: in other words, as to whether, apart from the special circumstances in this case, including a judgment recovered upon the footing of an assignment, the lessors could after the bankruptcy have asserted that privity of estate had been established between them and the assignee by an assignment which was in itself an act of bankruptcy, and as such void ab initio.

MATHEW L.J. I agree with the judgment which has been read by Romer L.J.

Appeal dismissed.

Solicitors for plaintiffs: *Debenham & Walker.*
Solicitors for defendant: *West, King & Adams.*

E. L.

BROOKS, JENKINS & CO. *v.* MAYOR, &c., OF TORQUAY AND NEWTON ABBOT RURAL DISTRICT COUNCIL.

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Oct. 25, 26, 28;
Dec. 2.

Local Government—Urban District Council—Retainer of Solicitors by Resolutions not under Seal—Subsequent affixing of Seal after Work partly done under Retainer—Costs of Local Inquiry—Costs of Parliamentary Opposition to Confirmation of Provisional Order—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 297, 298—*Municipal Corporations* (*Borough Funds*) *Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 8—*Local Government Board's Provisional Orders Confirmation* (*No.* 14) *Act*, 1900 (63 & 64 *Vict. c. clxxxiii.*).

An urban district council, by resolutions not under seal, retained the plaintiffs, a firm of solicitors, to represent them at a local inquiry as to the proposed inclusion of their district in adjoining areas, and to oppose in Parliament a bill for the confirmation of a provisional order made by the Local Government Board for carrying the proposed scheme into effect. Subsequently, after work had been done by the plaintiffs under the retainers, the seal of the council was affixed to the resolutions by which the plaintiffs were retained as solicitors, and sealed copies of these resolutions were sent to the plaintiffs; the retainer was not accepted in writing by the plaintiffs. The confirming Act having passed, the plaintiffs delivered their bill of costs to the urban district council and afterwards, upon the dissolution of the council, to the defendants, between whom the district had been divided:—

Held, that the confirmation under seal of the original retainers was binding on the district council without a new consideration, and that the requirements of s. 174 of the Public Health Act, 1875, and of the common law had been complied with; that the costs were costs properly incurred under ss. 297 and 298 of the Public Health Act, 1875, as being the reasonable costs of a local authority in respect of a provisional order made in pursuance of the Act and of the inquiry preliminary thereto; that they were not subject to the requirements of the Municipal Corporations (Borough Funds) Act, 1872, but came within the exception contained in s. 8 of that Act; and that therefore the urban district council were before their dissolution under a liability, subject to taxation and to the sanction of the Local Government Board, to pay the plaintiffs' bill of costs:

Held, further, that upon the true construction of art. 18 of the Torquay Order, 1900, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900, the liability of the urban district council had been transferred to the defendants.

ACTION tried before Walton J. without a jury.

The facts are set out at length in the judgment, and it is only necessary here to state that the plaintiffs, a firm of

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solicitors and parliamentary agents, were suing to recover from the defendants a sum of 1198*l.* 4*s.* 2*d.*, the amount of their bill of costs for professional services rendered to the Cockington Urban District Council in respect of a local inquiry and of a parliamentary opposition to the confirmation of a provisional order of the Local Government Board, called the Torquay (Extension) Order, 1900, which liability of the Cockington District Council was alleged to have been transferred to the defendants by art. 18 of that order. The Cockington District Council had passed various resolutions, commencing on May 18, 1900, by which the plaintiffs were retained and instructed to act as their solicitors; these resolutions were not under seal, but on September 6, 1900, the council passed a resolution that their seal should be affixed to each of the resolutions which constituted the retainers; this was done, and sealed copies of these resolutions were sent to the plaintiffs; there was no acceptance in writing by the plaintiffs of the retainers. The bill of costs included items for work done and disbursements made by the plaintiffs both before and after the sealed retainers were received by them. By the statement of claim the plaintiffs claimed "a declaration that the defendants are liable to pay to the plaintiffs in such proportions as may be agreed or awarded under s. 62 of the Local Government Act, 1888, the sum of 1198*l.* 4*s.* 2*d.*, or such other sum as may be certified on taxation and sanctioned by the Local Government Board for money paid, work done, and professional services rendered by the plaintiffs for and at the request of the urban district council of Cockington as their solicitors and agents in respect of a parliamentary opposition by the said urban district council to the confirmation by Parliament of the Torquay Order, 1900."

Macmorran, K.C., and *Romer Macklin*, for the plaintiffs. First, the Cockington Urban District Council were under a legal liability to pay the costs incurred by the plaintiffs in representing them at the local inquiry and in conducting the parliamentary opposition to the provisional order. Although the original retainers were not under seal, their confirmation under seal on September 6 made them valid retainers; they

were given in consideration of the plaintiffs undertaking to proceed with the work already begun and to finish it, and they therefore form a new contract under seal with a sufficient new consideration to support it. But a new consideration was not essential to the validity of the confirmation under seal of the original retainers, for that confirmation satisfied the requirements of s. 174 of the Public Health Act, 1875, and was binding on the council. When the retainer was originally given, it was uncertain whether the costs would exceed 50*l.*, and it was only when it became evident that that sum would be exceeded that the necessity for a retainer under seal arose. Further, in opposing the provisional order, the Cockington Council were merely exercising the ordinary right of a corporate body in the position of a trustee to defray out of the funds in its hands the expense of an attack made by parliamentary proceedings against its very existence: *Attorney-General* v. *Brecon Corporation* (1); the case of *Leith Council* v. *Leith Harbour Commissioners* (2), where it was held ultra vires for a public health authority to include in a public health assessment the costs of a successful opposition to a bill in Parliament for the alteration of their district, is not really an authority against the plaintiffs' contention, for the decision there went upon the ground that the authority were seeking to charge the costs on the wrong fund. The costs were properly incurred under ss. 297 and 298 of the Public Health Act, 1875, which sections are incorporated in the Local Government Act, 1888, by s. 87, sub-s. 2; they therefore come within the saving clause (s. 8) of the Municipal Corporations (Borough Funds) Act, 1872, and it is immaterial that the requirements of that Act as to costs incurred under its provisions have not in fact been complied with. Secondly, the liability to payment of these costs has, subject to taxation and to the sanction of the Local Government Board under s. 298 of the Public Health Act, 1875, been transferred to the defendants by virtue of the provisions of art. 18 of the Torquay (Extension) Order, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900 (63 & 64 Vict. c. clxxxiii.).

(1) (1878) 10 Ch. D. 204. (2) [1899] A. C. 508.

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C. A. Russell, K.C., and *Willoughby Williams*, for the Torquay Corporation. The Cockington Council were under no liability to the plaintiffs in respect of these costs, for there was no retainer of the plaintiffs under seal. At common law the appointment by a corporate body of a medical officer, or of a clerk to the master of a workhouse, must be under seal: *Dyte* v. *St. Pancras Guardians* (1); *Austin* v. *Bethnal Green Guardians* (2); so also must the retainer of a solicitor by a highway board: *Phelps & Woodford* v. *Upton Snodsbury Local Board*. (3) Further, under s. 174 of the Public Health Act, 1875, every contract made by an urban authority, whereof the value or amount exceeds 50*l*., is to be in writing and sealed with the common seal of the authority; this provision is imperative: *Hunt* v. *Wimbledon Local Board* (4); and applies even in the case of an executed contract of which the urban authority has had the full benefit and enjoyment: *Young* v. *Leamington Corporation*. (5) The affixing of the seal on September 6 to the original resolution did not amount to a ratification of the original retainer or to a new contract for the employment of the plaintiffs; it could not be a new contract, as the plaintiffs were not parties to it, and payment under such a contract would be ultra vires. On the assumption, however, that there was in other respects a valid retainer, it was invalid because the conditions imposed by the Municipal Corporations (Borough Funds) Act, 1872, upon the right of a "governing body" to incur costs in promoting or opposing bills in Parliament were not complied with. Having regard to the decision of the House of Lords in *Leith Council* v. *Leith Harbour Commissioners* (6), it cannot be successfully contended that the Cockington Council was entitled to incur these costs for the purpose of defending its corporate existence. Even assuming the liability of the Cockington Council, art. 18 of the Torquay Order has not the effect of transferring that liability to the defendants.

Roskill and *Cane*, for the Newton Abbot Rural Council.

(1) (1872) 27 L. T. (N.S.) 342.
(2) (1874) L. R. 9 C. P. 91.
(3) (1885) 1 Cab. & Ell. 524.
(4) (1878) 4 C. P. D. 48.
(5) (1883) 8 App. Cas. 517.
(6) [1899] A. C. 508.

Macmorran, K.C., in reply. It is not ultra vires for a corporate body to pay for work of which it has had the benefit, although the work has been done under a contract not under seal: *Bournemouth Commissioners* v. *Watts* (1); the Cockington Council would not therefore have been bound to take the objection that there was no sealed contract. Where work is done for a corporate body under a contract not under seal, and the seal is subsequently affixed, the affixing of the seal makes a good contract under s. 174 of the Public Health Act, 1875, in respect of the work already done: *Melliss* v. *Shirley Local Board.* (2) And, further, s. 174 only applies to a contract the parties to which, at the time of entering into it, contemplate that it shall exceed 50*l.*: *Eaton* v. *Basker.* (3)

Cur. adv. vult.

1901. Dec. 2. The following written judgment was delivered by

WALTON J. At the end of 1899 the borough of Torquay presented a memorial to the Local Government Board asking for the extension of their borough by the inclusion within it of the whole or part of the urban district of Cockington. The district council of Cockington resolved to oppose this memorial, and the plaintiffs were retained to act as solicitors and parliamentary agents for them in and for the purposes of this opposition. A local inquiry was held, and on May 17, 1900, a provisional order, called the Torquay Order, was made by the Local Government Board. This order had no effect until confirmed by Parliament. Its effect, if and when confirmed, was to dissolve the Cockington district as from November 9, 1900, and to add part of Cockington to Torquay, and the other part (called in the order the excluded part of Cockington) to the rural district of Newton Abbot. Cockington resolved to oppose in Parliament the bill for the confirmation of the Torquay Order, and the plaintiffs were instructed to act, and did act, for Cockington in and for the purposes of such

(1) (1884) 14 Q. B. D. 87. (2) (1885) 14 Q. B. D. 911.
(3) (1881) 7 Q. B. D. 529.

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opposition. In spite of this opposition the bill was passed and received the Royal assent on July 30, 1900.

The plaintiffs' bill of costs in respect of the parliamentary opposition was delivered to Cockington on November 8, 1900, and a copy of it was delivered to the defendants on November 26, 1900. It was not practicable to get the plaintiffs' parliamentary costs taxed before November 9, 1900, which was the date of the dissolution of the Cockington district. The present action was commenced on January 29, 1901, and the taxation has been postponed until this action has been disposed of. It is admitted by the plaintiffs that their claim is subject to taxation and to the sanction of the Local Government Board under s. 298 of the Public Health Act, 1875.

The plaintiffs' claim shortly is this: that Cockington was liable to them for these costs, that, Cockington having been dissolved and divided between Torquay and Newton Abbot, the effect of the Torquay Order as confirmed by Parliament is to transfer their liability to Torquay and Newton Abbot in shares to be adjusted between them either by agreement or in the mode prescribed by s. 62 of the Local Government Act, 1888.

The first question is whether Cockington was under any liability to the plaintiffs for the costs in question. It is said that there was no valid retainer of the plaintiffs under the seal of the Cockington Urban District Council. The facts as to the retainer are as follows: Resolutions of the district council of Cockington, beginning with a resolution of May 18, 1900, were passed from time to time and communicated to the plaintiffs, by which they were retained and instructed to act as solicitors and parliamentary agents for the district council in and about the matters in respect of which the present claim arises. If it were not necessary that they should be under seal, it is not contended that the retainers were not sufficient to support the claim. Apparently on or at some time before September 6, 1900, it occurred to the clerk of the district council that the retainer should be under seal, and at his suggestion on September 6, 1900, a resolution was passed by the district council that the seal of the council should be, and it was, affixed to each of the resolutions constituting the retainers to which I have

referred, and sealed copies of these resolutions were on the same day sent to the plaintiffs. The claim includes items for work done and disbursements made after the sealed retainers were received by the plaintiffs. Under these circumstances it is contended by the defendants that, as well by the common law as by virtue of s. 174 of the Public Health Act, 1875, the retainer of the plaintiffs was invalid and of no binding effect, because it was not under the seal of the district council, and that as to so much of the claim as relates to anything done before September 6, 1900, the district council of Cockington was under no liability, and therefore the defendants cannot be under any liability to the plaintiffs. The plaintiffs do not admit that it was necessary that the retainers should be under seal, and further contend that the retainers sealed on September 6, 1900, were sufficient on the ground (1.) that they were given and sealed in consideration of the plaintiffs undertaking to proceed with and finish the work, and that this constituted a new contract under seal with a sufficient new consideration; and (2.) on the ground that the confirmation under seal of the original retainers was binding upon the district council without any new consideration.

There is no doubt that the plaintiffs proceeded with the business and made such disbursements as were made after September 6, 1900, on the faith, and in consideration of, the confirmation under the seal of the council of the original retainers. But, apart altogether from this, I think that the confirmation by the council under their seal of the original retainers created an obligation binding upon the council without any new consideration. A promise under seal, whether made for a past consideration or without consideration, is binding. As against this, it was contended for the defendants that it was ultra vires on the part of the district council to create such an obligation without consideration. It was, however, decided in the case of *Bournemouth Commissioners* v. *Watts* (1), and the earlier cases there cited, that where work had been done for a local authority under a contract which was invalid because it was not under seal, it was not ultra vires

(1) 14 Q. B. D. 87.

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for the local authority to pay for the work of which they had had the benefit. If under such circumstances it is not ultra vires for the local authority to pay, it cannot be ultra vires for them to bind themselves to pay by an instrument under seal.

It was further contended by the defendants that by s. 174 of the Public Health Act, 1875, the contract must be in writing, and that therefore it must be not only sealed by the local authority, but also signed by the other party. It would, however, in my judgment be a strained and unreasonable construction of the section to hold that, where solicitors have acted upon a retainer under the seal of a local authority, they cannot recover their costs because the retainer was not accepted by them in writing. The object of s. 174 plainly was that the terms of important contracts (which are defined as contracts to an amount exceeding 50*l.*) should be expressed in writing, and that local authorities should not bind themselves to such contracts without that degree of deliberation which is supposed to be ensured by the formalities required in the execution of a deed. It may be noted that it was, according to the old authorities, because this deliberation was ensured in the execution of an instrument under seal that a promise so made was held to be binding without consideration: see Leake on Contracts, p. 124; Plowden, p. 308.

It was further contended by the plaintiffs that in the present case it was uncertain at the date of the original retainers whether the costs would or would not amount to 50*l.*, and that therefore the case was not within s. 174. I prefer, however, to decide this point in favour of the plaintiffs, on the ground that the confirmation under seal on September 6, 1900, of the earlier unsealed retainers was sufficient to satisfy the requirements of s. 174 of the Public Health Act, 1875, and of the common law.

The next objection taken by the defendants was that the costs could not be recovered, because the requirements of the statute 35 & 36 Vict. c. 91 (The Municipal Corporations (Borough Funds) Act, 1872) had not been complied with. By that Act power is given to certain local authorities under

certain conditions to incur costs in promoting or opposing bills in Parliament. It is admitted that these conditions were not in the present case fulfilled by the district council of Cockington. But by s. 8 of the Act it is provided that "Nothing in this Act shall extend or be construed to alter or affect any special provision which is or shall be contained in any other Act for the payment of the costs, charges, and expenses intended to be provided for by this Act, or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exercisable by the inhabitants of any district under any general or special Act." It was in the first place contended for the plaintiffs that the district council in opposing the bill by which the district of Cockington was to be dissolved was exercising a right or power which they possessed independently of the 35 & 36 Vict. c. 91, a right of self-preservation necessarily vested in every such body—a right to resist an attack on their existence. In support of this contention they relied on the judgment of Jessel M.R. in *Attorney-General* v. *Mayor of Brecon* (1), and as against it the defendants relied on *Leith Council* v. *Leith Harbour and Docks Commissioners*. (2) If I had to decide this question I should have at all events considerable difficulty in accepting the plaintiffs' contention that the present case is not governed by the decision of the House of Lords in the latter case. But the plaintiffs further contended that, even if this be so, the costs in question in the present case were costs properly incurred under ss. 297 and 298 of the Public Health Act, 1875, which are incorporated in the Local Government Act, 1888, by s. 87, sub-s. 2, of that Act, and therefore were within the saving clause (s. 8) of the Act of 1872. By s. 298 of the Act of 1875, "The reasonable costs of any local authority in respect of provisional orders made in pursuance of this Act, and of the inquiry preliminary thereto, as sanctioned by the Local Government Board, whether in promoting or opposing the same, shall be deemed to be expenses properly incurred for purposes of this Act by the local authority interested in or affected by such provisional

(1) 10 Ch. D. 204. (2) [1899] A. C. 508.

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orders, and such costs shall be paid accordingly; and if thought expedient by the Local Government Board, the local authority may contract a loan for the purpose of defraying such costs." A provisional order is by s. 297, sub-s. 3, of no force whatever until confirmed by Parliament. It is said for the defendants that s. 298 applies to such costs as are incurred before the provisional order is made by the Local Government Board; but it is to be observed that s. 298 applies to the costs both in respect of the inquiry preliminary to the provisional order, and also in respect of the provisional order itself, and whether in promoting or in opposing the same. I think that the costs in question were clearly costs incurred in respect of the opposition to the provisional order. I come to the conclusion, therefore, that the costs in question were authorized by s. 298 of the Public Health Act, 1875, and are not subject to the requirements of the Borough Funds Act, 1872. The result of my judgment upon these points is that, subject to taxation and to the sanction of the Local Government Board under s. 298 of the Public Health Act, 1895, the district council of Cockington, if it had continued to exist, would have been liable to the plaintiffs for the costs in question in this action.

But the district of Cockington has been dissolved, and the question remains (and this is the only other question to be dealt with in this action) whether this liability of Cockington has been transferred to the defendants. This depends on the effect of art. 18 (2) of the Torquay Order as confirmed by Parliament, which is as follows: "Subject to the provisions of this order—(*a*) All property and liabilities which immediately before the commencement of this order are vested in or attach to either of the urban councils in relation exclusively to any part of the added areas shall be transferred to vested in and attach to the corporation as urban district council, and any property and liabilities vested in or attached to either of the urban councils in relation to any part of the added areas conjointly with any other area shall be a matter for adjustment under s. 62 of the Act of 1888. (*b*) All property and liabilities which immediately before the commencement of

this order are vested in or attach to the Cockington Council or the St. Mary Church Council in relation exclusively to the excluded part of Cockington or the excluded part of St. Mary Church as the case may be shall be transferred to vested in and attach to the rural council." The application of this article to the present case was recently considered by Buckley J. in an application, which was made by Torquay against Cockington before Cockington was dissolved, for a mandamus to compel Cockington to levy a rate for the purpose of paying the costs now in question. The application was dismissed by Buckley J., and I entirely agree with the view expressed by that learned judge. By art. 17 (1), "The urban councils shall liquidate as far as practicable before the commencement of this order all current debts and liabilities incurred by them respectively"; and by art. 17 (2), "The reasonable costs incurred by either of the urban councils before the date of this order in respect of the inquiry preliminary to the said order and otherwise in connection with the said order shall, if and so far as such costs may be sanctioned by the Local Government Board, be paid by the corporation out of the district fund and general district rate of the borough." It seems clear that the costs in question could not practically be paid before the commencement of the order (November 9, 1900), because they could not be taxed, nor could the sanction of the Local Government Board be obtained before that date. Sub-s. 2 of art. 17, as held by Buckley J., refers only to costs incurred before the date of the order, which was May 17, 1900, and therefore does not apply to the costs now in question. The liability in question being a liability which attached to the urban council of Cockington in relation to the whole of Cockington, and therefore (in the language of art. 18 (2)) attached to Cockington in relation to the added area (added to Torquay) conjointly with another area, i.e., the excluded part of Cockington, which was added to the rural district of Newton Abbot, is therefore a matter for adjustment under s. 62 of the Act of 1888. When adjusted, that share of the liability adjusted to the added area becomes a liability attaching to that area exclusively,

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and transferred by art. 18 (*a*) to Torquay; and that share of the liability adjusted to the excluded part of Cockington becomes a liability attaching to Cockington in relation exclusively to the excluded part of Cockington, and is transferred by art. 18 (*b*) to the defendants, the rural council of Newton Abbot. The result, therefore, is that in my judgment a declaration must be made in the terms of the first paragraph of the claim in the statement of claim.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Brooks, Jenkins & Co.*

Solicitors for Torquay Corporation: *Batten, Proffitt & Scott, for A. W. Cowdell, Torquay.*

Solicitors for Newton Abbot Rural Council: *Milner & Bickford.*

W. J. B.

C. A.

1902

March 8.

[IN THE COURT OF APPEAL.]

SACHS *v.* HENDERSON.

Practice—Costs—Action founded on Tort—Agreement for Lease of House—Removal of Fixtures—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *s.* 116.

By a written agreement the defendant agreed to grant and the plaintiff to take a lease of certain premises from a future date. After the agreement and before the date at which the lease was to commence, the defendant removed certain fixtures from the premises. The lease was executed and the defendant went into possession. He then discovered that the fixtures had been removed, and brought an action in the High Court against the defendant for wrongfully removing the fixtures, and obtained judgment for 20*l*. On appeal from an order affirming the taxation of the costs of the plaintiff on the county court scale:—

Held, that the action was founded on tort within the meaning of s. 116 of the County Courts Act, 1888, and that the plaintiff was entitled to costs on the High Court scale.

APPEAL from an order of a judge at chambers affirming the taxation of the costs of the plaintiff on the county court scale.

The statement of claim alleged an agreement in writing made in October, 1899, and contained in certain letters, by

which the plaintiff agreed to take and the defendant to grant a lease of a house and premises from the 25th of the following March. It further alleged that at the date of the contract certain fixtures were affixed to and were part and parcel of the house and premises; that the lease was executed and the plaintiff went into possession on March 31, 1900; that the lease contained an option to the plaintiff to purchase the house and premises on giving a certain notice; and that after the date of the contract the defendant wrongfully removed certain fixtures from the premises, for which removal the plaintiff claimed damages. The rent of the house was 275*l.* a year. The statement of defence alleged that there was no binding agreement for a lease, and in the alternative, while denying liability, the defendant brought into court the sum of 20*l.* as sufficient to satisfy the plaintiff's claim. The plaintiff took the money out of court in satisfaction of his claim. Upon taxation of costs, the master was of opinion that the action was founded on contract within the meaning of s. 116 of the County Courts Act, 1888, and that the plaintiff, having recovered less than 50*l.*, was only entitled to costs upon the county court scale, and the costs were taxed accordingly. The decision of the master was affirmed by a judge at chambers.

The plaintiff appealed.

G. A. Scott, for the plaintiff. The plaintiff is entitled to costs on the High Court scale, for the action was founded on tort and not on contract, and even if it is an action founded on contract, it could not have been commenced in the county court, and therefore s. 116 of the County Courts Act, 1888, does not apply. The act of the defendant in taking away the fixtures was tortious. The defendant was, between the time of the contract and the execution of the lease, in certain respects a trustee for the plaintiff: *Clarke* v. *Ramuz*. (1) He was bound not to let the property deteriorate through any negligence of his, and a fortiori not to do any act which made it less valuable. The contract is stated, not to support the

(1) [1891] 2 Q. B. 456.

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cause of action, but to shew that there was a duty the breach of which is the cause of action. The conveyance did not put an end to that right of action, as it would, by merger, had the cause of action been on contract. In *Turner* v. *Stallibrass* (1) the relation between the plaintiff and the defendant as bailor and bailee arose out of the contract of agistment; but there it was held that the plaintiff was not obliged to rely for his cause of action on the contract, but could shew a breach of duty arising at common law out of the relation established by the contract. Such cases as those arising on the carriage of goods—*Pontifex* v. *Midland Railway* (2); on the carriage of passengers: *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway* (3); *Kelly* v. *Metropolitan Railway* (4); and on agistment: *Turner* v. *Stallibrass* (1)—all support this view.

Secondly, the action could not have been commenced in the county court, because the value of the property would not permit of this being done, and title would come in question, as it would be necessary to prove a valid agreement to let.

Cleave, for the defendant. The position of the defendant was that of a freeholder entitled to do what he pleased with the property, subject only to the limitations arising out of his contract with the plaintiff. His acts with relation to the subject-matter of the contract depend for their validity or the contrary on the contract, and the plaintiff has no rights except those founded on the contract. The defendant, under the contract, should have handed over certain specified articles, of which particulars are given in the plaintiff's pleadings, and as he failed to do this he is liable to an action to recover their value. There was no negligence and no misconduct, for the defendant acted in pursuance of what he fancied were his rights. The contract must be read as if it contained a list of these articles and an undertaking to hand them over, and a breach of that undertaking is breach of contract and not tort. In this case there was no duty apart from the contract, which

(1) [1898] 1 Q. B. 56.
(2) (1877) 3 Q. B. D. 23.
(3) [1895] 1 Q. B. 134.
(4) [1895] 1 Q. B. 944.

was to hand over the premises with the fixtures at a future date, and the substance of the action is contract.

The action cannot involve title to land, because it only turns on a contract to hand over chattels worth 20*l.*

COLLINS M.R. This appeal raises the question whether the 20*l.* recovered by the plaintiff in this action was recovered in an action founded on contract, or in one founded on tort, within the meaning of s. 116 of the County Courts Act, 1888. The master and the judge have held that this was an action founded on contract, and that the plaintiff can only recover costs on the county court scale. It seems to me that when the facts of the case are looked into they shew that the action was in substance one founded on tort, and it has been repeatedly laid down that this question of costs does not depend on the technical form of the pleadings, but that the substance of the matter must be looked at.

It appears that the plaintiff made an agreement with the defendant in October of one year for a lease from the latter to commence in the following March, and under that agreement the plaintiff had an option to purchase if he gave a certain notice. After the plaintiff had taken possession under the lease he found, as alleged in the statement of claim, that certain fixtures, which were on the premises at the time of the agreement, had been taken away. It seems to me that the case is really decided by *Turner* v. *Stallibrass*. (1) It was there pointed out that, when dealing with breaches of duty, it is not enough, in order to establish that the action is one of contract, to aver that the duty arose in the last resort from a contract. That was a case of a bailment, and the relation of bailor and bailee must arise out of a consensus between the parties; nevertheless, it was held that the action brought in respect of the acts of the defendant was one of tort, and it was pointed out that in nearly all cases of breach of duty there must be some antecedent consensual relation between the parties, and that when once the relationship is established, and there is a breach of duty arising from that relationship, the action in respect of

(1) [1898] 1 Q. B. 56.

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Collins M.R.

the breach would be one of tort. I agree that the distinction between tort and contract is not a logical one, and that it is sometimes difficult to say whether a particular thing is a wrong or a breach of contract. If the claim of the plaintiff had been set out at large pointing to some particular stipulation in the contract, which stipulation had been broken, the action would be founded on contract; but where it is only necessary to refer to the contract to establish a relationship between the parties, and the claim goes on to aver a breach of duty arising out of that relationship, the action is one of tort. Several cases have been cited, into which I do not think it is necessary to go. The railway cases are an illustration of what I have been saying. There the relationship is commenced with an agreement whereby a person is received by the railway company as a passenger, and in a certain sense all the reciprocal rights between the parties spring from that agreement; but when there has been a breach of duty by the company arising out of the relationship that has been created, and an action is brought in respect of the breach, that is in substance an action of tort. In this case there was a clear duty on the vendor not to take away without the knowledge of the purchaser any of the things which made the subject-matter valuable. In substance, an action founded on that breach of duty is an action founded on tort, and the order which has been made treating it as an action founded on contract cannot be supported. The appeal must, therefore, be allowed.

ROMER L.J. The only safe way in which to determine questions of costs under s. 116 of the County Courts Act, 1888, is to deal with each case as it arises, and determine whether it is in substance an action founded on tort or one founded on contract. Applying that principle to the case before us, to my mind it is substantially an action founded on tort. The case is that the defendant was a person who was under an obligation to grant a lease of certain premises with the fixtures thereon. He improperly removed some of the fixtures, and did not disclose the fact that he had done so. The plaintiff consequently took possession of the property under an impression

induced by the conduct of the defendant that the fixtures were still upon the land. His cause of action under these circumstances is for a tort.

An alternative point of view is to regard that which the defendant did as a breach of duty. The lessor took upon himself a duty or obligation with regard to the premises that he had agreed to let. It was not an absolute obligation to preserve them intact, but it was an obligation to take reasonable care in the preservation of the subject-matter of the lease. If he is negligent in performing that duty he may be treated as responsible for a tort. Yet it is suggested that because he did something more than this and was not negligent, but took away certain fixtures deliberately, he is somehow or other in a better position than if he had been merely negligent, and that he has done a less wrongful act. It is plain to my mind that this cannot be, and that the order as to costs, based on the view that the action is founded on contract, cannot be supported.

Appeal allowed.

Solicitors for plaintiff: *St. Barbe Sladen & Wing.*
Solicitors for defendant: *Guscotte, Wadham & Co.*

A. M.

1902
Feb. 11, 20.

McDOWALL *v.* GREAT WESTERN RAILWAY COMPANY.

Negligence—Liability—Intervening Act of Third Party—Effective Cause of Damage.

The defendants' servants shunted some vehicles on to a siding which was on an incline running down to a level crossing over a highway. The siding had a catch-point which would have prevented the vehicles if set loose from running down the incline, but, for the convenience of their shunting operations, the defendants' servants did not place the vehicles beyond the catch-point, but screwed down their brakes, and left them in a position in which they would not have caused any damage if not interfered with. Some boys, however, trespassing on the siding, unscrewed the brakes and detached a vehicle, which ran down the incline and injured the plaintiff, who was lawfully passing along the highway over the level crossing. The defendants were aware that boys were in the habit of trespassing on the siding and meddling with vehicles placed upon it:—

Held, that the defendants were liable for the damage sustained by the plaintiff, since they were aware of the danger of interference with the vehicles, and negligently omitted to take reasonable precautions to prevent the consequences of that interference.

FURTHER CONSIDERATION before Kennedy J.

The action was brought by the plaintiff, an infant, suing by her next friend, to recover damages from the defendants in respect of injuries sustained by her through the alleged negligence of the defendants or their servants. It was tried before Kennedy J. and a jury at the Haverfordwest Assizes, and, the jury having answered specific questions put to them by the judge and assessed the damages at 175*l.*, the case was adjourned for further consideration.

The following statement of facts is taken from the written judgment of Kennedy J.:—

"The claim is for damages for serious injury inflicted on the plaintiff, a girl of nineteen years of age, in July, 1900, by a brake-van belonging to the defendants and under the management of their servants at Pembroke.

"The defendants, as part of their railway system at Pembroke, have a branch called the Hobbs Point Branch, which is an off-

shoot of the main line and is chiefly used as a siding. The Hobbs Point Branch line crosses on the level a highway with a gate on either side across the line of railway. For some distance from the highway to the eastward there is a steepish gradient in the railway line of about one in fifty-five, descending to the point where the line crosses the highway. In the course of the gradient is what is termed a 'catch-point,' which would arrest and divert any railway trucks or carriages which from any cause happened to run down the incline towards the highway, and would prevent them, as the defendants' witnesses phrased it, from 'running wild.' On the day before the accident a servant of the company had taken an engine with five trucks and a brake-van along the Hobbs Point Branch from the railway station, intending to leave them there as on a siding until they were required. He drew them beyond and to the westward of the catch-point, that is to say, to a position on the incline between the catch-point and the highway, and there left them, after putting on the brake in the van and properly spragging, as the operation is called, that is, securing by means of pieces of wood, the wheels of the trucks. The van was attached to the trucks by the screw coupling, which was not screwed up tight, but sufficiently tight, if not interfered with, to hold the van in connection with the trucks. The position would not have been a safe one in regard to the highway if these precautions had not been taken, but with the sprags on the trucks and the brake on the van it would have been safe, as the jury have found by their verdict, if things had remained as they were when the trucks and the van were left in this condition. The defendants' evidence shewed that the reason why the trucks and the van were not left to the eastward of the catch-point was that they wished by going further to the westward to have an extra space of line for shunting other carriages to be brought afterwards on to the branch from the main line. The Hobbs Point Branch was separated on the one side from some open ground belonging to the defendants by a wire fence, and on the other side it was bounded by a field which was separated from the high road by a garden. For years the defendants had been troubled by

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boys trespassing on this part of the line and playing in and about the vehicles left standing upon it.

"The day after the shunting operations some boys appear to have come on the line where the trucks and van were, and to have amused themselves by playing with the vehicles and their fastenings. They were seen doing this, or, at all events, they were seen on and close to the van, and they seem carelessly to have unfastened the screw coupling of the van, and partially to have released the brake. In consequence of this the van, loosed from the trucks, ran down the incline, smashed the gate which separated the railway from the highway, as well as a gate higher up, and knocked down and seriously injured the plaintiff, who was passing along the highway. It was to recover damages for the negligence of the defendants, which, as the plaintiff alleged, caused these injuries, that the action was brought. It was tried before me, sitting with a jury at the last assizes at Haverfordwest. The jury assessed the damages at 175*l.*, and returned answers to specific questions which I left to them. The questions and answers were as follows: 'Was the van, in regard to the persons using the highway where the plaintiff was, in a safe position, as and where it was left by the defendants' servants on the 20th of July, unless interfered with afterwards?' The jury said, 'Yes.' Secondly: 'Would the accident to the plaintiff have happened if the van had not been interfered with?' Answer: 'No.' Thirdly: 'Was the interference the act of trespassers, and, if so, was the interference with the wilful intent of causing the van to descend the incline, or merely negligent?' Answer: 'Yes; the act of trespassers with negligence.' Fourthly: 'Was the danger of such interference causing injury to persons using the highway known to the defendants at the time the van was left and kept where it was, and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants?' Answer: 'Yes; it was known and could have been guarded against by the exercise of reasonable care on the part of the defendants.' Fifthly: 'Was the occurrence of the injury to the plaintiff materially and effectively caused

by want of reasonable care and skill on the part of the defendants' servants in placing and keeping the van as and where it was placed by them, either (1.) in regard to its position, apart from interference by trespassers; or (2.) in regard to its danger if interfered with; or (3.) in any other way?' To that the jury answer, 'Yes; the company were negligent in not placing the van to the east of the catch-point'; and then they assess the damages as I have stated."

Feb. 11. *Arthur Lewis* (*E. M. Samson* with him), for the plaintiff. On the findings of the jury the plaintiff is entitled to judgment. The defendants knew of the danger to persons using the highway, and they could have guarded against it by the exercise of reasonable care and skill. The fact that the immediate cause of the accident was the intervening act of a third party is immaterial: *Clark* v. *Chambers*. (1) Where injury is caused by the negligence of two independent parties, the person injured can maintain an action against either of them: *The Bernina* (2), where this is laid down by Lord Esher M.R. (3) This is really an a fortiori case, since it is plain that if one of the boys had himself been injured the defendants would have been liable although the boy was a trespasser: *Lynch* v. *Nurdin*. (4) The jury have found that the neglect of the defendants to guard against the mischievous acts of the boys was the effective cause of the accident, and they are therefore liable: *Engelhart* v. *Farrant* (5); *Harrold* v. *Watney*. (6)

Francis Williams, *K.C.* (*Denman Benson* with him), for the defendants. The defendants are not liable. In all the cases where a defendant has been made liable for an act of a third party he has himself been guilty of some act which was in itself negligent. In *Ilott* v. *Wilkes* (7) the defendant had set spring-guns, and in *Jordin* v. *Crump* (8) dog-spears, both of which were dangerous if not illegal things to do. So, in

(1) (1878) 3 Q. B. D. 327.
(2) (1887) 12 P. D. 58.
(3) 12 P. D. at p. 61.
(4) (1841) 1 Q. B. 29; 55 R. R. 191.
(5) [1897] 1 Q. B. 240.
(6) [1898] 2 Q. B. 320.
(7) (1820) 3 B. & Ald. 304; 22 R. R. 400.
(8) (1841) 8 M. & W. 782.

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Illidge v. *Goodwin* (1) and *Lynch* v. *Nurdin* (2), horses and carts were left unattended in a highway; and in *Daniels* v. *Potter* (3) and *Hughes* v. *Macfie* (4) cellar-flaps in the street were improperly fastened. In all the other cases reviewed in the judgment of the Court in *Clark* v. *Chambers* (5) the same will be found to be the case: *Bird* v. *Holbrook* (6); *Hill* v. *New River Co.* (7); *Burrows* v. *March Gas Co.* (8); *Collins* v. *Middle Level Commissioners* (9); *Harrison* v. *Great Northern Ry. Co.* (10); *Greenland* v. *Chaplin.* (11) In all those cases the defendant was guilty of some initial negligence. Here the only negligence which the jury have attributed to the defendants is that they did not anticipate the unlawful acts of trespassers. A person is not bound to assume that others will commit wrongful acts. In *Smith* v. *London and South Western Ry. Co.* (12), where the defendants were held liable for a fire caused by leaving dry hedge cuttings which became ignited by sparks from an engine, it was held that, as it was common knowledge that engines did emit sparks, the defendants ought to have anticipated the danger; but there is no obligation on any reasonable person to anticipate that others will act unlawfully: *Daniel* v. *Metropolitan Ry. Co.* (13); *Latch* v. *Rumner Ry. Co.* (14); *Parker* v. *City of Cohoes.* (15)

Samson replied.

Cur. adv. vult.

Feb. 20. KENNEDY J. read the following judgment:—In this case the material facts may be shortly stated. [The learned judge stated the facts as above set out, and continued:—]

I did not give judgment at the time, but reserved the case, which is in some respects peculiar, for further consideration;

(1) (1831) 5 C. & P. 190; 38 R. R. 798.
(2) 1 Q. B. 29; 55 R. R. 191.
(3) (1830) 4 C. & P. 262; 34 R. R. 793.
(4) (1863) 2 H. & C. 744.
(5) 3 Q. B. D. 327.
(6) (1828) 4 Bing. 628; 29 R. R. 657.
(7) (1868) 9 B. & S. 303.
(8) (1872) L. R. 7 Ex. 96.
(9) (1869) L. R. 4 C. P. 279.
(10) (1864) 3 H. & C. 231.
(11) (1850) 5 Ex. 243.
(12) (1870) L. R. 6 C. P. 14.
(13) (1871) L. R. 5 H. L. 45.
(14) (1858) 27 L. J. (Ex.) 155.
(15) (1878) 10 Hun. (N.Y.) 531; 74 N. Y. 610.

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and the questions of law arising upon the case have been fully argued before me. The defendants' contention, put shortly, is that, as the placing of the van and trucks where they were placed was, as they were left, safe and without danger to others, there was no negligence in any act of the defendants; and that they cannot be held legally responsible for an occurrence which was immediately and directly due to the subsequent act of trespassers. The plaintiff, on the other hand, relying especially on the fourth finding of the jury, contends that the principles laid down by the Queen's Bench Division in the considered judgment in *Clark* v. *Chambers* (1), and in the earlier case of *Lynch* v. *Nurdin* (2), and other cases which were fully reviewed in that judgment, and also in the later decision of the Court of Appeal in *Engelhart* v. *Farrant* (3), are applicable here. They contend that the jury were warranted in finding as they did, in answer to the fourth and fifth questions, that the defendants were in the circumstances guilty of negligence in leaving and keeping the trucks and van in the place in which they left and kept them, and that such negligence was the material and effective cause of the injury to the plaintiff.

I have upon the whole come to the conclusion that the plaintiff's contention is right. The finding of the jury in answer to the fourth question, namely, that the defendants, at the time of placing and keeping the van where they did, knew of the danger to those on the highway of such interference as caused the plaintiff's hurt, appears to me to be conclusive. The position in which, with this knowledge, they placed and kept the van was one of danger, because, if the interference happened so as to set the vehicles in motion, there was nothing there to stop the van running down the incline and crashing through the intervening gates and over the highway. There was a catch-point which had been placed to prevent, and which would in fact have prevented, such a disaster. With the knowledge of the danger the defendants, for the convenience of their traffic arrangements, preferred not to use this obvious and effective safeguard. There was, I

(1) 3 Q. B. D. 327. (2) 1 Q. B. 29; 55 R. R. 191.
(3) [1897] 1 Q. B. 240.

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think, quite sufficient evidence to justify the finding of the jury of the defendants' knowledge of the existence of the danger which the defendants' servants thus needlessly imposed upon persons using the highway.

For years, according to the defendants' witnesses, they had been troubled by boys playing with and on the trucks and carriages left stationary at this part of the line. This portion of the branch is bounded on the one side by a wire fence, which separated it from some open ground of the defendants, and on the other side by a field, which was separated from the high road by a garden. To the knowledge of the defendants boys used to get into the trucks, and even to unlock the doors of the vans on the siding, for the purposes either of theft or of amusement. If the defendants knew of this systematic, or, at any rate, very frequent interference, it does not appear to me to be otherwise than reasonable for the jury to say that they must be taken to have known, as one of the risks involved, that the trucks and vans kept in position on the down grade only by temporary means, which apparently were easily movable, might, if uncontrolled by the catch-point, cause mischief to the users of the highway. If, as the jury have found, the risk of interference by trespassers with trucks and vans in this locality was a risk known to the defendants, and if the consequent danger of their movement down the incline to the highway was also a known risk, and if, further, this danger might have been guarded against by the exercise by the defendants of reasonable care, as the jury have also found, I can see no legal reasons upon which the defendants can claim immunity merely because the boys were trespassers. I may point out that in *Engelhart* v. *Farrant* (1) the act which immediately caused the plaintiff's hurt was an unauthorized and improper act on the part of the person who did it; and in *Lynch* v. *Nurdin* (2) Lord Denman said (3): "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury

(1) [1897] 1 Q. B. 240. (2) 1 Q. B. 29; 55 R. R. 191.
(3) 1 Q. B. at p. 35.

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should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." In this case the van as placed was not a cause of danger, but the defendants knew in effect that it might become a cause of danger, for they knew the risk of the interference which would create danger, and yet they omitted to take a reasonable precaution to prevent its consequences. Therefore, as it seems to me, the principle of liability, as stated in the passage which I have read from Lord Denman's judgment, applies.

I give judgment for the plaintiff for the amount found by the jury by their verdict.

Judgment for the plaintiff.

Solicitors for plaintiff: *A. R. & H. Steele, for W. J. Jones, Haverfordwest.*

Solicitor for defendants: *R. R. Nelson.*

A. P. P. K.

ANDREW *v.* GROVE.

1902

March 19.

County Court—Practice—Costs—Power to order successful Defendant to pay Costs—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 113.

A county court judge has no power to order a successful defendant to pay the costs of the plaintiff.

APPEAL of the defendant from the judgment of the county court judge of East Stonehouse.

This was an action, brought in the High Court and remitted to the county court, in which the plaintiff sought to recover from the defendant the amount of a bet. The defendant set up the defence of the Gaming Acts. At the trial the plaintiff called the defendant as a witness, and he denied that the bet had been accepted or made. The county court judge gave judgment for the defendant, but ordered the defendant to pay the plaintiff's costs upon the ground that he did not believe a word of the defendant's evidence, and thought that he had

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perpetrated a swindle. The defendant appealed from that part of the judgment whereby he was ordered to pay the costs of the plaintiff.

Colam, for the defendant. The county court judge had no power to make this order. It has been decided that a judge of the High Court has not the power to order a successful defendant to pay the plaintiff's costs: *Dicks* v. *Yates* (1); *Foster* v. *Great Western Ry. Co.* (2); *In re Mills.* (3) The power as to costs given to the county court judge by s. 113 of the County Courts Act, 1888 (4), is no wider than the power given to judges of the High Court by the Judicature Acts and Rules. In the county court the plaintiff can only get costs in accordance with the scales of costs: County Court Rules, Order LA, r. 17; and under those scales a plaintiff who recovers nothing is not entitled to any costs. This action was brought in the High Court, and plaintiff, having recovered less than 20*l.*, is, by s. 116 of the County Courts Act, not entitled to any costs. This action could have been commenced in the county court: *Solomon* v. *Mulliner.* (5)

Ashton Cross, for the respondent. The cases which have been cited were all before the Judicature Act, 1890 (53 & 54 Vict. c. 44), which by s. 5 provides that "the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." That provision was enacted in order to enlarge the power of judges of the Supreme Court as to costs: *In re Fisher.* (6) The words of s. 113 of the County Courts Act are certainly as wide as the words of s. 5 of the Judicature Act, 1890, and under both a judge has now full power to direct by whom the costs shall be paid.

(1) (1880) 18 Ch. D. 76.

(2) (1882) 8 Q. B. D. 515.

(3) (1886) 34 Ch. D. 24.

(4) 51 & 52 Vict. c. 43, s. 113: "All the costs of any action or matter in the Court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall abide the event of the action or matter."

(5) [1901] 1 K. B. 76.

(6) [1894] 1 Ch. 53, 450.

The power to order a successful party to pay the costs must, of course, be exercised for good cause, and in this case the conduct of the defendant at the trial was good cause for ordering him to pay the costs.

Colam replied.

LORD ALVERSTONE C.J. It has been contended in this case that, under s. 113 of the County Courts Act, 1888, the county court judge has power to make the successful defendant in an action pay the costs of the plaintiff. That is a startling proposition, because, subject to what may be the effect of the Judicature Act, 1890, it is quite clear that a judge of the High Court has no such power. It is not immaterial to observe that s. 113 of the County Courts Act, 1888, is not a new provision: it was in the original County Courts Act of 1846 (9 & 10 Vict. c. 95, s. 88). In my opinion this is a section which enables the county court judge to award costs in the exercise of a judicial discretion, but to give him that discretion there must be some right established by the plaintiff. The extent to which it has been recognised that a judge cannot order a successful defendant to pay all the plaintiff's costs is well illustrated in the case of *Dicks* v. *Yates* (1), for it was argued in that case that the appeal would not lie because it was an appeal as to costs only, but it was held that it was an appeal on the merits. It is not disputed that the same principle was recognised in *Foster* v. *Great Western Ry. Co.* (2) and *In re Mills.* (3) It is contended, however, that the provisions of s. 113 are wider than the provisions of Order LXV., r. 1, of the Rules of the Supreme Court, and are at least as wide as the provisions of s. 5 of the Judicature Act, 1890. We have not now to express any opinion as to the effect of s. 5 of the Judicature Act, 1890; but it seems to me that s. 113 of the County Courts Act, 1888, does not give the county court judge power to order a successful defendant to pay the plaintiff's costs generally. It is obvious that s. 113 of the County Courts Act, 1888, is required for other cases. With reference to

(1) 18 Ch. D. 76.

(2) 8 Q. B. D. 515.

(3) 34 Ch. D. 24.

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s. 116 of the County Courts Act, 1888, it is not in our opinion conclusive to shew that the plaintiff is not entitled to retain this order upon the ground that she is not entitled to any costs having recovered less than 20*l*. Those are directions as to the costs when the plaintiff succeeds. Indirectly, however, that section does shew that it was never contemplated that the plaintiff should get his costs when the defendant succeeds. I have come, therefore, to the conclusion that this power does not exist in county courts, and that a county court judge has no power to order a successful defendant to pay the costs of the plaintiff except under the circumstances mentioned in the cases to which I have referred.

DARLING J. I am of the same opinion.

CHANNELL J. I am of the same opinion. I may add that the county court judge has power to order a successful defendant to pay such part of the plaintiff's costs as has been caused by the defendant's misconduct in the action.

Appeal allowed.

Solicitors for appellant: *Taylor, Willcocks & Lemon, for Jackson, Plymouth.*

Solicitors for respondent: *Riddell & Co., for Geake, Plymouth*

J. F. C.

GOODWIN *v.* SHEFFIELD CORPORATION.

1902
March 14, 17.

Police—Pension—"Annual Pay"—Free Rooms and Fuel—Police Act, 1890 (53 & 54 *Vict. c.* 45), *Sched. I., rr.* 1, 11.

By the Police Act, 1890, a constable, after a certain number of years' approved service, is entitled to a pension, which is to be calculated on the amount of his "annual pay" at the date of his retirement.

A divisional inspector of police with his family resided free of rent at the police station, and had the free use of fuel, gas, and water:—

Held, that the value of the free residence and fuel, gas, and water, was not part of his "pay" for the purpose of calculating his pension.

When a constable appeals to quarter sessions, under s. 11 of the Police Act, 1890, from the decision of the watch committee as to the amount of his pension, a case may be stated for the opinion of the King's Bench Division on a question of law.

CASE stated by the Recorder of Sheffield upon an appeal against a decision of the watch committee of the Sheffield Corporation.

The appellant joined the Sheffield police force in 1868, and was appointed inspector in 1876, and divisional inspector in 1892, and retained that appointment until he retired from the force in 1901. He accepted the provisions of the Police Act, 1890. As an inspector he received the weekly pay of 2*l.* 10*s.*, and a fire brigade allowance of 15*s.* per lunar month, making together the sum of 139*l.* 15*s.* a year. From that there was deducted 1¼ per cent. as a contribution towards the police pension fund. When he was made divisional inspector he was required to live at the divisional head police station, where he resided free of rent and rates, and had the free use of the fuel, gas, and water, provided for the station, for the rooms occupied by himself and his family; these matters were agreed to be of the value of 30*l.* a year. No alteration was then made in his pay, unless those matters of the value of 30*l.* might properly be described as "pay." The deductions for the pension fund were still made only in respect of the 139*l.* 15*s.* a year as theretofore, though the appellant on different occasions applied to the watch committee to have

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his cash pay increased to 170*l.* per year, and to be allowed to pay for his rooms and the fuel, &c., and to have a deduction for the pension fund made in respect of that sum of 170*l.*; but this application was refused.

The appellant gave proper notice of his desire to retire from the force and to receive a pension, and he was entitled as of right, by the Police Act, 1890, to retire and to receive a pension for life of two-thirds of his "annual pay" at the date of his retirement. The watch committee awarded him a pension of 93*l.* 3*s.* 4*d.* a year, being two-thirds of the said sum of 139*l.* 15*s.* He then applied to the watch committee, under s. 11 of the Police Act, 1890, for a reconsideration of the amount of his pension, but the watch committee declined to award an increased pension. The appellant then duly appealed to the next quarter sessions for Sheffield against the decision of the watch committee, upon the ground that his pension was calculated upon a wrong basis, being upon a lower rate of pay than he was in law and in fact actually receiving.

In 1893 a sub-committee of the watch committee presented a report, which was adopted by the council, recommending that Inspector Moody should be promoted to the rank of chief inspector of detectives, and that his remuneration should be equal to that of a divisional inspector, who in addition to his pay received an allowance for taking charge of fire-extinguishing apparatus at his station, and was provided with a good house free of rent and rates, and supplied gratuitously with water, coal, and gas; and they estimated the pay and allowances of a divisional inspector at 170*l.* a year, and recommended that Moody's pay should be increased to that amount. From that time Moody received an annual cash payment of 170*l.*, from which $1\frac{1}{4}$ per cent. was deducted for the pension fund. Under the "scale of pay" for the police force, which was adopted by the council in 1891 and was in force when the appellant retired, the pay of an inspector in the position of the appellant was 2*l.* 10*s.* per week. In the "pay sheet," which the appellant signed weekly, there was entered under the heading "Rate of Pay per week," 2*l.* 10*s.*, and under the heading "Deductions payable to Superannuation

Fund—Contributions," 7½*d.*, and, under the heading "Net Pay received by each Officer and Constable," 2*l.* 9*s.* 4½*d.*; under the headings "Allowance for Rent," "Allowance for Boots," and "Gross Amount of Pay," there were no entries. The appellant also gave a separate receipt for the monthly sum of 15*s.* for taking care of the fire-extinguishing apparatus as "pay for special duty." If the said matters agreed to be of the value of 30*l.* per year formed part of the "annual pay" of the appellant, within the meaning of the Police Act, 1890, the amount of his pension should have been 113*l.* a year, and not 93*l.* 3*s.* 4*d.* as fixed by the watch committee. The recorder allowed the appeal and reversed the decision of the watch committee, and made an order that the amount of the appellant's pension should be 113*l.* a year instead of 93*l.* 3*s.* 4*d.*, subject to the opinion of the King's Bench Division upon the case stated. (1)

The question for the opinion of the Court was whether upon the above facts the said matters agreed to be of the value of 30*l.* a year were or were not part of the "annual pay" of the appellant, within the meaning and for the purposes of the Police Act, 1890. If they were, the order of quarter sessions was to stand confirmed; but, if not, then the said order was to be quashed, and the decision of the watch committee to stand confirmed.

Macmorran, K.C., and *H. W. W. Wilberforce*, for Goodwin. There is a preliminary objection that this Court has no jurisdiction to entertain this appeal. By s. 11 (2) of the Police

(1) See the report in 65 J. P. 458.

(2) The Police Act, 1890 (53 & 54 Vict. c. 45), s. 11: "In any of the following cases:—

"(*a*) Where a pension after being granted to a constable has subsequently in pursuance of this Act been declared to have been forfeited:

"(*b*) Where a constable is dismissed without a pension to which he would be otherwise entitled, and in any other case where a constable, or the widow or child of a constable, claims a pension or allowance under this Act as of right, and the police authority do not admit the claim,

the constable, widow, or child may apply to the police authority for a reconsideration of the claim to the pension or allowance, and if aggrieved

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Act, 1890, the final decision is left to the court of quarter sessions, and a case cannot be stated for the opinion of the King's Bench Division, because that is an appeal. This point was not raised in *Upperton* v. *Ridley*. (1) [He cited *Reg.* v. *Bridge*. (2)]

Avory, K.C., and *W. Valentine Ball*, for the Sheffield Corporation. This is not an appeal at all. The recorder only gave his decision subject to the opinion of this Court upon a special case—that is, he has asked this Court to exercise the consultative jurisdiction which it has exercised from early times: 2 Nolan's Poor Laws, p. 558.

[The Court intimated that they would hear the case.]

This case is governed by the decision in *Upperton* v. *Ridley* (1), in which it was held that an additional money payment made regularly to the police constable for special services, in addition to his ordinary pay, could not be taken into consideration for the purpose of estimating his pension. This is an a fortiori case. If the value of the free rooms, &c., is to be taken into consideration, so also must the value of boots and clothing supplied, or the amount of an allowance made for those things; but that has never even been suggested. All these things can only be called allowances, and are not "pay." In s. 2 of the Police Act, 1893, the distinction is made between "pay" and "allowances." In this case it could properly have been said that the fire brigade allowance was not "pay" for the purposes of pension, but the corporation have allowed their police the benefit of that allowance in estimating their pensions. The learned recorder seems to have thought that the words of

by the decision upon such reconsideration may apply to the next practicable court of quarter sessions for the county within which the constable last served; or if the constable last served in the police force of a borough having a separate police force and a separate court of quarter sessions, then to the next practicable court of quarter sessions for that borough, and that Court, after inquiry into the case, may make such order in the matter as appears to the Court just, which order shall be final; but nothing in this section shall confer a right to appeal against the exercise of any discretion, or against any decision, which is declared by this Act to be final."

(1) [1901] 1 K. B. 384.

(2) (1890) 24 Q. B. D. 609.

s. 11, "may make such order in the matter as appears to the Court just," gave him a kind of equitable jurisdiction to fix the amount of the pension in his discretion, and to have done so without deciding the question of law whether this benefit was "pay" of the constable. (1) The court of quarter sessions has not, however, any such discretion, and cannot take into consideration anything which is not "pay" within the meaning of the Act. In s. 32, sub-s. 5, of the Act of 1890 the distinction is drawn between "pay" and "emoluments"; and the same distinction is made in other Acts dealing with the same subject, e.g., the Superannuation Act, 1859 (22 Vict. c. 26), and the Poor Law Officers Superannuation Act, 1896 (59 & 60 Vict. c. 50).

Macmorran, K.C., and *H. W. W. Wilberforce*, for Goodwin. This case is not governed by the decision in *Upperton* v. *Ridley* (2), which turned upon the fact that the payment there in question was purely a gratuity for special services, to which there was no contractual right. That is very different from the present case. The document in this case, which is called a "pay sheet," is in no way conclusive; it merely purports to shew how much money is to be paid to a particular man. It is a question of fact in each case what is the "pay" of a constable, which may be either more or less than he receives in cash. In some cases money is given instead of a house, but both are equally "pay." This corporation themselves have so treated it in the case of Moody, whose pay they fixed at 170*l.* a year as being the equivalent of Goodwin's pay. If it is a question of fact, the recorder has found that Goodwin's pay was 170*l.* a year, and his finding cannot be reviewed.

Avory, K.C., replied.

LORD ALVERSTONE C.J. In this case I have felt great difficulty in coming to a conclusion. It is not, in my opinion, covered by the case of *Upperton* v. *Ridley* (2); but that case lays down the principle that everything which a police constable receives in money or otherwise by way of remuneration is not of necessity to be included in his "pay" for the purpose of

(1) See the report of his decision in 65 J. P. 458. (2) [1901] 1 K. B. 384.

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assessing the amount of his pension. I do not think that the decision in *Upperton* v. *Ridley* (1) goes further. I think, therefore, that we have to consider in this case whether an emolument of the kind which this police constable received is to be included in the "annual pay" of the police constable, which is given in the 1st schedule to the Police Act, 1890, as the basis for estimating his pension. With great doubt I have come to the conclusion that it ought not to be so included. "Pay" is to a certain extent a technical word, which is used with reference to certain classes of employment, such as soldiers, sailors, and police. At the time when the Police Act, 1890, was passed, allowances paid in kind were well known; allowances for clothing, for boots, and in some cases for rent, were made, and in some cases police constables lived rent free at the police station or in police barracks. If it had been intended that the "annual pay" of a police constable was to be estimated by the money value of all that he received, either in money or in kind, different considerations would have applied. I think, however, that the statute, and the decision in the Court of Appeal, shew that "annual pay" in the statute must be taken to include only that which can properly be called pay. In this case the police constable lived at the police station and had fuel, gas, and water free. I think that it is difficult to include in the term "pay" such things as free residence, fuel, gas, and water, and that if we once get away from the "pay" fixed by the employment we get into different considerations. The passage in s. 2 of the Police Act, 1893, to which Mr. Avory referred, points in the same direction. Therefore, I think that upon the facts of this case it is impossible to hold that these things were "pay." It was strenuously contended on behalf of Goodwin that the question as to what is the pay of a police constable is a question of fact, and that the finding of the recorder as to what was the "pay" in this case cannot be reviewed. I think that the recorder did not base his judgment upon such a finding of fact. It is to be observed that an appeal lies to the recorder only when the police constable claims a pension as of right, and he can only

(1) [1901] 1 K. B. 384.

claim a pension as of right when he shews that he claims in respect of that which comes within the words "annual pay." I think, therefore, that this appeal must prevail. I should mention that the document which was signed by the police constable in this case is different from that which was signed by the police constable in *Upperton* v. *Ridley* (1), and the facts of the case were different. There is the further difficulty, that it is not possible to put the parties back into the same position, because the deduction for the pension fund was not made in respect of the value of the free residence, fuel, gas, and water, and the police constable has received the full value of those things without any deduction. I do not attach any importance to the fuel, gas, and water; those things were mere incidents of the residence in the police station. With regard to the preliminary objection, I am satisfied that s. 11 was not intended to deprive a party of his right to have a case stated upon a question of law, and I think this case comes within the principle of *Reg.* v. *Bridge*. (2)

DARLING J. I am of the same opinion. It is, I think, a case of some hardship, especially as the police constable tried to get his pay fixed at a higher sum and to be allowed to pay for his residence, fuel, gas, and water. We have to consider whether the free residence and the other incidents of that residence come within the words of the Act, "annual pay," there being other words which more aptly describe such things. I think that they do not. I do not think that free residence in a house with free fuel, gas, and water can be called part of the police constable's "annual pay," as intended by the statute in which that term is used. If a house is "pay" because it gives additional value to the appointment, uniform also would be "pay": each increases the value of the appointment. But I cannot see how we could hold that a house was part of the pay without also holding that uniform was part of the pay, and it has not even been suggested that uniform is pay. I agree that the fuel, gas, and water were merely incidents of the residence in the house. For these reasons I think that

(1) [1901] 1 K. B. 384. (2) 24 Q. B. D. 609.

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the natural meaning of the term "annual pay" is that which is received in money, and not that which is received in other ways.

CHANNELL J. I am of the same opinion. I am confirmed in the opinion which I expressed in *Upperton* v. *Ridley* (1), that "pay" in the Police Act, 1890, is used as a technical word for a fixed money payment as distinguished from allowances. There is an obvious convenience in making the fixed money payment the standard for assessing the pension, and not including allowances the value of which would have to be estimated in some way or other. I think that there is enough in the statute itself to shew that "pay" is a technical word having a very technical meaning—that is, the amount fixed by the scale of pay. I agree that it is not clear that that view was adopted to the full extent by the Court of Appeal in *Upperton* v. *Ridley* (2), but there is nothing inconsistent with that view in the case in the Court of Appeal.

Appeal allowed. Leave to appeal.

Solicitors for appellant: *Richard F. & C. L. Smith, for H. Sayer, Sheffield.*

Solicitors for respondents: *Pitman & Son.*

(1) [1900] 1 Q. B. 680. (2) [1901] 1 K. B. 384.

J. F. C.

THE KING *v.* FRENCH AND OTHERS.

1902
March 13, 17.

Justices—Jurisdiction—Summary Conviction on Charge of Assault—Question as to Title to an Interest in Land—Commoner—User in excess of Right of Common—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 46.

In the proviso to s. 46 of the Offences against the Person Act, 1861, which enacts that nothing therein contained shall authorize any justice to hear and determine any case of assault in which "any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom," the words "title to" govern, not only the words "lands, &c.," but also the words "any interest therein or accruing therefrom."

An assault was committed by one commoner upon another commoner in the course of a dispute as to whether the latter was or was not at the time of the assault in the act of using the common land in a manner in excess of the right of common. The latter summoned the former for assault, and he was convicted:—

Held, that there was no question raised as to the title to any lands, or as to the title to any interest in land, and that the jurisdiction of the justices to hear and determine the case of assault was not ousted.

RULE for a writ of certiorari to bring up and quash a conviction by justices of Suffolk of Wilson Moorsom Roberts for an assault upon John Gerneys Freeman upon the ground that, a claim of right having been raised, the jurisdiction of the justices was ousted.

The following facts appeared from the affidavits:—

Freeman, the complainant, and Roberts, the defendant, were both owners of copyhold lands in the parish of Aspall, forming part of a manor, and in respect thereof they enjoyed a right of common without stint and the right to depasture commonable beasts upon Aspall Green. For some few days previously to November 16, 1901, the complainant had been engaged in carting swedes across the turf of Aspall Green. The defendant was of opinion that the complainant, as a commoner, had no right to take a horse and cart across the green, except along a road, and he considered that the taking of a cart over the turf caused damage to his right of pasture; but it did not appear that he had given any notice to the complainant that he

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objected to the manner in which the carting was being carried on. On November 16, whilst the complainant was on the green carting swedes across the turf, the defendant went up to him and told him that what he was doing was illegal and improper, and ordered him to remove the horse and cart off the turf on to the roadway. The complainant did not comply with this order, and an altercation followed in the course of which the defendant struck the complainant with a whip.

The complainant summoned the defendant for assault. In the course of the hearing of the summons by the justices, counsel for the defendant raised the objection that the assault was committed by the defendant whilst supporting a claim to a right of common, and that the jurisdiction of the justices was ousted by reason of the proviso to s. 46 of the Offences against the Person Act, 1861, which enacts that nothing therein contained "shall authorize any justices to hear and determine any case of assault and battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom."

The justices were of opinion that the defendant's claim was frivolous and was not a bonâ fide claim, and they disallowed the objection and convicted the defendant.

This rule was thereupon obtained on behalf of the defendant.

Walter Stewart, for the complainant, shewed cause against the rule. On the evidence before them the justices were right in holding that the defendant's claim of right was not made bonâ fide. Both parties had rights of common, and no objection had ever been raised by the defendant to the practice of taking a horse and cart across the grass. The mere assertion of a frivolous claim of right does not oust the jurisdiction of the justices.

Avory, K.C. (*Rowley Elliston* with him), for the defendant, in support of the rule. The question whether the jurisdiction of the justices was ousted does not depend, as the justices seem to have thought, on whether there was, according to the common law principle, a bonâ fide claim of right, but on whether a question was raised as to the title to land or as to

any interest therein or accruing therefrom within the meaning of those words in the proviso to s. 46 of the Offences against the Person Act, 1861. There was in this case a question raised as to an interest in land, because the justification for the assault depended on whether the complainant by taking a horse and cart across the turf of the common, instead of by the road, was exceeding his rights as a commoner and was thereby causing damage to the defendant's right of pasture. If he was, there was a further question to be considered, namely, whether one commoner is entitled to use force to prevent another commoner from damaging his right of common by an improper user of the common. Before the question of the assault could be adjudicated upon, it was necessary that these questions, which were questions as to an interest in land, should be determined, and the jurisdiction of the justices was therefore ousted, though the defendant could have been proceeded against by way of indictment. It was not open to the justices to consider whether the defendant used more force than was reasonably necessary for the assertion of his right: *Reg.* v. *Pearson* (1); nor was the defendant bound to justify before the justices his claim to remove by force the obstruction caused by the complainant's horse and cart, for as soon as the question arose the jurisdiction of the justices ceased. But the authorities shew that the use of force was in the circumstances justifiable. A commoner may by force remove any obstruction placed upon the common land which interferes with the enjoyment of the right of common: *Davies* v. *Williams* (2); *Perry* v. *FitzHowe* (3); *Hall* v. *Harding.* (4)

[DARLING J. referred to *Jones* v. *Jones* (5) and *Reg.* v. *Cridland.* (6)

LORD ALVERSTONE C.J. Is not the true meaning of the proviso to s. 46 that there must be a question as to the title to land or a question as to the title to any interest in land or accruing therefrom?]

It is difficult to see how there could be a question as to title

(1) (1870) L. R. 5 Q. B. 237.
(2) (1851) 16 Q. B. 546.
(3) (1846) 8 Q. B. 757.
(4) (1769) 4 Burr. 2427.
(5) (1862) 1 H. & C. 1.
(6) (1857) 7 E. & B. 853.

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to an interest in land which was not also a question as to title to land, and that construction therefore seems to give no effect to the latter words of the proviso. The intention of the section is to exclude from the consideration of the justices all questions arising out of disputes as to land.

Stewart, in reply, by leave, as to the cases cited. None of the authorities which have been referred to supports the contention that a nuisance may be abated by force where it involves an assault upon the person. In *Reg.* v. *Pearson* (1) it was admitted that the assault was committed in the assertion of a bonâ fide claim of right.

Cur. adv. vult.

March 17. LORD ALVERSTONE C.J. In this case a rule was obtained for a writ of certiorari to issue to bring up and quash a conviction for assault, and the question is whether the magistrates had any jurisdiction to entertain the matter, the point having been taken by the defendant that the case came within the proviso in s. 46 of the Offences against the Person Act, 1861.

The facts are not in dispute. The complainant and the defendant both had rights of common over a certain piece of land, and for two or three days before the assault the complainant had been engaged in carting across the grass of the land in a way which the defendant objected to. It does not appear that the defendant had given any notice of his objection to the complainant, or had raised any question as to what he was doing, until the day in question, when, the complainant being then in the act of carting turnips across the grass, the defendant after some remonstrance assaulted him by striking him with a whip. The complainant summoned the defendant for this assault, and at the hearing the defendant took the objection that the jurisdiction of the justices was ousted on the ground that the case raised a question as to an interest in land. The justices were of opinion that the objection was a frivolous one and that they ought not to give effect to it, and they convicted the defendant.

(1) L. R. 5 Q. B. 237.

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It was argued by Mr. Avory in supporting the rule that the justices had confused the question which arises under s. 46 with the question as to a bonâ fide claim of right. The justices may not have perfectly appreciated the difference, but I think that, in substance, they entertained the question from the right point of view. Sect. 46 contains the following proviso: "Provided also that nothing herein contained shall authorize any justice to hear and determine any case of assault and battery in which any question shall arise as to the title to any lands, tenements or hereditaments, or any interest therein or accruing therefrom." It was not denied that the defendant might have been indicted for the assault, but it was contended that because a question as to the rights of a commoner was connected with the assault, the justices had no jurisdiction to deal with the case. I am of opinion that this point fails, and that the decision of the justices was right. I do not think that the section can be construed as meaning that any question as to any interest in land, whenever raised and however raised, is sufficient to oust the jurisdiction of the justices. Their jurisdiction is ousted when in the course of the proceedings before them a question arises as to the title to land or to any interest therein; but it does not, in my opinion, make a question of title arise in the proceedings merely because the defendant says that he was in the possession of land and that the complainant was upon the land when the assault was committed. In the present case no question arose as to the title to land or as to the title to any interest in land. Both parties were admittedly commoners and had rights on the land.

When pressed with this difficulty, Mr. Avory cited authority to shew that a commoner has the right to remove obstructions from the common land, as, for example, by pulling down a house; but the fact that a commoner has that right and that a question as to that right may arise does not solve the question as to the true meaning of the proviso in s. 46, or as to the conditions necessary for the application of that proviso. Mr. Avory also relied on *Reg.* v. *Pearson* (1), in which it was decided that where

(1) L. R. 5 Q. B. 237.

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a bonâ fide question as to title to land is involved the jurisdiction of the justices is ousted, and the justices, therefore, cannot inquire into the question whether any excess of force has been used. Now, if that case were an authority on the question which we have to determine, it would of course be binding upon us; but when the facts of that case are examined they will be found to differ in substance from the facts in the present case. In *Reg.* v. *Pearson* (1) it was uncontradicted that the assault was committed in the assertion of title. The prosecutor had entered upon land to which the defendant claimed title, and it was in the act of asserting that title that the assault was committed, and the decision proceeded on the admission that the question of title caused the assault, and, therefore, arose in the proceedings before the justices. The reason given in the judgments in the old authorities for ousting the jurisdiction of the magistrates in such cases is that, unless it were ousted, the justices would indirectly decide a question of right and title between the parties. Now, in the present case it is clear that no question of a right in either one or the other party arose. It was merely a question of an assault being committed at a place where both parties had a right to be. In my opinion, the justices were right in deciding that the defence that there was a question of title involved was a frivolous one, and in that sense they were right in considering the bona fides of the claim. No question of title did arise, and, therefore, the rule will be discharged.

DARLING J. I am of the same opinion. It seems to me that to hold otherwise than as my Lord has expressed would be to determine that justices could never convict for an assault if the assault were committed in any quarrel concerning land, and this even if the parties were not on the land at the time of the assault. The statute clearly cannot have that meaning.

CHANNELL J. I agree. I only wish to make it clear that our judgment in this case proceeds on the footing that the proviso to s. 46 must be read so that the word "title" governs

(1) L. R. 5 Q. B. 237.

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Channell J.

not only the words "lands, tenements or hereditaments," but also the words "any interest therein or accruing therefrom." In the case before us no question was raised as to the title to an interest in land or accruing therefrom. It is said that it is not easy to give a meaning to the words "interest therein or accruing therefrom," but I think that the words apply exactly to a right such as this, a profit à prendre arising out of the land. If any question had arisen as to the title to this right of common the statute would have applied; but no such question did arise: it was a mere quarrel arising out of the right which was admittedly in both parties.

Rule discharged.

Solicitors for complainant: *Morris & Bristow, for Lawton, Warnes & Sons, Eye.*

Solicitors for defendant: *Guscotte & Fowler.*

F. O. R.

MINISTER & CO. *v.* APPERLY AND OTHERS.

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March 7.

Practice—Costs—Appeal—Official Referee—Discretion as to Costs—Leave to Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Order* XXXVI., *r.* 55 (*b*); *Order* LXV., *r.* 1.

Where the whole of an action is referred by order of Court to an official referee, without any direction as to costs in the order, his decision as to costs cannot be appealed against except by his leave.

MOTION, by way of appeal, as to costs, from the decision of an official referee in an action to recover damages for negligence.

By an order of Court the action was referred to the official referee for trial with all the powers of certifying and amending of a judge of the High Court, and with power to direct judgment to be entered, and otherwise deal with the whole action.

The official referee awarded damages to the plaintiffs, and directed judgment to be entered for them for the total sum awarded, with costs up to the date of a letter written by the defendants to the plaintiffs after action brought, in which letter

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they offered the plaintiffs a sum in satisfaction of their claim, and he directed that from and after that date each party should pay his own costs. He gave no leave to appeal from his order as to costs.

The plaintiffs now moved to set aside so much of the official referee's decision as deprived the plaintiffs of their costs from the date of the letter, on the grounds that no good cause was shewn for depriving the plaintiffs of their costs, and that the official referee had acted on a wrong principle in so depriving them.

Macaskie, K.C. (*Bremner* with him), for the defendants, took the preliminary objection that, the official referee having given no leave to appeal, no appeal would lie against his decision as to costs.

By s. 49 of the Judicature Act, 1873, "no order made by the High Court of Justice or any judge thereof . . . . as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or a judge making such order." By Order XXXVI., r. 55 (*b*), "Where the whole of any cause or matter is referred to an official referee under an order of Court, he may, subject to any directions in the order, exercise the same discretion as to costs as the Court or a judge could have exercised." By Order LXV., r. 1, the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court or judge;—provided that where any action, cause, matter, or issue is tried with a jury the costs shall follow the event, unless the judge by whom such action, &c., is tried, or the Court, shall for good cause otherwise order. [He referred to *Arbib* v. *Henry* (1); *Carr Brothers* v. *Dougherty* (2); *Adlington* v. *Conyngham* (3); *Bew* v. *Bew*. (4)]

A. T. Lawrence, K.C., and *Montague Lush*, for the plaintiffs. The official referee has proceeded upon a wrong principle in dealing with the costs. He had no good cause for depriving the plaintiffs, who succeeded in the action, of their costs. He

(1) (1895) 99 L. T. Journal, 283.
(2) (1898) 67 L. J. (Q.B.) 371.
(3) [1898] 2 Q. B. 492.
(4) [1899] 2 Ch. 467.

has not exercised a judicial discretion, and there is, therefore, an appeal from his decision. By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15, sub-s. 1, an official referee is to be deemed to be an officer of the Court, and by sub-s. 2 "the report or award of any official . . . . referee . . . . shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury." An order as to costs made after the verdict of a jury can always be appealed against on the ground that it was not made with good cause.

LORD ALVERSTONE C.J. I entertain no doubt upon the question. Where costs have been given to a person who has no right to them, there is an appeal; but where there is no right and they are in the discretion of the persons who have to award them, then there is no appeal except by leave. I am of opinion that the preliminary objection to this motion must succeed.

DARLING and CHANNELL JJ. were of the same opinion.

Motion dismissed.

Solicitors for plaintiffs: *Lewis & Newton.*

Solicitors for defendants: *William Sharp; and Mackrell, Maton, Godlee & Quincey.*

W. A.

1902
March 26.

THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF BLACKPOOL, APPELLANTS *v.* JOHNSON, RESPONDENT.

Local Government—Offences—Erection of Premises in advance of Building Line—Change of Ownership—Continuance in same State after Written Notice—Liability of New Owner—Public Health (Buildings in Streets) Act, 1888 (51 *&* 52 *Vict. c.* 52), *s.* 3.

By the Public Health (Buildings in Streets) Act, 1888, s. 3, it is not lawful without the consent of the urban authority to erect a house in any street beyond the front main wall of the house on either side thereof; and "any person offending against this enactment shall be liable to a penalty not exceeding 40*s.* for every day during which the offence is continued after written notice in this behalf from the urban authority."

A house was erected by a builder in contravention of s. 3, and subsequently passed into the ownership of the respondent, who maintained the house in the same state after written notice from the urban authority:—

Held, that the respondent had not committed an offence under s. 3 of the Act.

CASE stated by justices for the borough of Blackpool.

An information was laid by the appellants against the respondent under s. 3 of the Public Health (Buildings in Streets) Act, 1888 (1), charging that a certain building situate in Yates Street in the said borough had, without the written consent of the urban authority of the borough, been unlawfully erected or brought forward beyond the front main wall of the house or building on either side thereof in the same street, and

(1) The Public Health (Buildings in Streets) Act, 1888, s. 3: "Section one hundred and fifty-six of the Public Health Act, 1875, is, save as hereinafter mentioned, hereby repealed, and in lieu thereof it is hereby enacted that it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority."

that the respondent did allow the offence to continue after written notice in that behalf from the corporation. Upon the hearing of the information the following facts were proved: In October, November, and December, 1900, and on January 24, 1901, plans of premises situate in Yates Street, consisting of shop, house, and cellar, were submitted to the building plans committee of the borough by one Hardman, the then owner and builder of the premises. The plans were on each occasion disapproved by the committee, but the premises were nevertheless erected by Hardman. The cellar, which was part of the house, was 12 feet beyond the front main wall of the adjoining buildings, and was 1 ft. 9 in. above the level of the street, and was therefore in contravention of s. 3 of the Act.

After the building of the premises had been completed by Hardman, he became bankrupt, and the premises passed into the ownership of the respondent.

On June 3, 1901, the appellants gave the respondent written notice that he had committed an offence against s. 3 of the Act by erecting or bringing forward a part of the house beyond the front main wall of the adjoining buildings, and that the respondent would be liable to a penalty for every day during which the offence was continued.

There was no evidence that the respondent, when he became the owner of the premises by purchase from Hardman, knew that Hardman had brought forward the building without the consent of the urban authority.

It was contended for the respondent that he had committed no offence, and, therefore, could not be guilty of a continuing offence.

It was contended for the appellants that the first part of s. 3 was declaratory only, and that the offence for which punishment was imposed was described in the second part of the section, and consisted in the continuance of the offence after notice.

The justices were of opinion that the respondent had not without the written consent of the urban authority erected or brought forward a building in contravention of the Act, and was, therefore, not liable to the penalty provided for each day

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during which the offence continued after notice. The justices accordingly dismissed the information.

The question for the opinion of the Court was whether their decision was right.

C. F. Pritchard (*Macmorran, K.C.*, with him), for the appellants. The respondent should have been convicted. By continuing the building in the state in which it was erected, after notice that it was in contravention of the Act, he has committed an offence under s. 3. The offence is a continuing one. The section is a re-enactment of s. 156 of the Public Health Act, 1875, and it was decided in *Rumball* v. *Schmidt* (1) that under that section the offence continued so long as the addition to the building was maintained after notice from the urban authority. In *Welsh* v. *West Ham Corporation* (2), which was a case under s. 158 of the Public Health Act, 1875, the Court recognised that the offence under that section was a continuing one, though it was held that the builder, who was no longer in possession of the premises, and who was, therefore, unable to make the necessary alterations, was not the proper person to proceed against. Similarly, in the present case a conviction could not be obtained against the builder, and if the respondent is not liable the result is that the Act becomes a dead letter whenever there has been a change of ownership after the erection of the building.

[CHANNELL J. Sect. 158 of the Public Health Act, 1875, contains an express provision that the existence of the work "shall be deemed to be a continuing offence." Those words are not in s. 3 of this Act.]

They are not necessary, having regard to the language of the second paragraph of the section.

The respondent did not appear.

LORD ALVERSTONE C.J. This is an appeal from a decision of justices declining to convict the respondent, the purchaser of a house from a builder who had in building it committed an

(1) (1882) 8 Q. B. D. 603. (2) [1900] 1 Q. B. 324.

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Lord Alverstone C.J.

offence against s. 3 of the Public Health (Buildings in Streets) Act, 1888. I should have thought that the case was perfectly clear, but for what has been said as to the effect of the previous cases. This being a criminal matter, it is necessary to shew beyond reasonable doubt that the person charged has committed an offence against the statute. Sect. 3 provides that it shall not be lawful without the consent of the urban authority to erect or bring forward any house or building beyond the house on either side. Now, it is admitted that the respondent did not come within the words, but it is suggested that he has committed an offence under the section, because he has continued to keep the building up after he received notice that it had been erected in contravention of the Act, and that he is, therefore, liable under the second part of s. 3 to a penalty. I think that very much stronger language would be required in order to make a person in the position of the respondent liable to penalties under this section. In a case such as this, where a man buys a house which has been erected or brought too far forward, I do not think that he commits an offence against the section by maintaining the house, after notice from the urban authority, in the same state as it was in at the time he bought it. The cases which have been cited have no application to the facts of the present case. In *Rumball* v. *Schmidt* (1) the proceedings were taken against the person who had originally built the house, and who has remained in occupation of it, and it was held that he was guilty of a continuing offence. In *Welsh* v. *West Ham Corporation* (2), decided by Darling and Channell JJ., proceedings were taken against a man who had no power to remedy the breach of the by-law complained of, because he was no longer in possession of the premises, and it was, therefore, held that the proceedings must fail. But in my opinion neither of those cases is an authority for saying that the respondent in this case has committed an offence. I think that the magistrates were right in refusing to convict, and the appeal must be dismissed.

(1) 8 Q. B. D. 603.

(2) [1900] 1 Q. B. 324.

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DARLING J. I am of the same opinion. I do not think that *Welsh* v. *West Ham Corporation* (1) conflicts with our decision in this case, and I think that the language which we used in that case was quite in accordance with the law.

CHANNELL J. I am of the same opinion. Both the cases which have been cited turned on different statutes, the language of which must be looked at in order to ascertain exactly what it was those cases decided. In this case the section is quite clear. It says that "any person offending against this enactment" shall be liable to a penalty, and one must therefore look at the section in order to see what it is that constitutes an "offending." The offence is the erection or bringing forward of a building in such a manner as to contravene the provisions of the Act; but there is nothing in the section which says that a person, who did not erect the building, but who has subsequently become the owner of it, is guilty of an offence.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Parkers, Pritchard, Barham & Lawford, for T. Loftos, Town Clerk, Blackpool.*

(1) [1900] 1 Q. B. 324.

F. O. R.

[APPEAL FROM THE RAILWAY AND CANAL COMMISSIONERS.]

[IN THE COURT OF APPEAL.]

C. A. 1902 *Feb.* 17.

THE LANCASHIRE BRICK AND TERRA COTTA COMPANY, LIMITED *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway—Adjoining Owner—Private Branch Railways—Private Sidings—Openings for Communication with Railway—Right to Require Openings—Limitations on Right—Railway Regulation Act, 1842 (5 & 6 *Vict. c.* 55), *s.* 12—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 76.

Sect. 76 of the Railways Clauses Consolidation Act, 1845, under which owners or occupiers of land adjoining a railway may make private branch railways communicating with the railway, and require the railway company to make openings in their rails, and such additional lines of rails as may be necessary for effecting communication, is applicable only to communications required by the owners of the branch railways for the purpose of using the railway with their own engines and carriages, and does not entitle an adjoining owner, who makes a siding, to demand communication with the railway for the purpose of establishing a claim to facilities for his traffic.

Held, also, that the limitation of the right of communication, between a railway and a private branch railway, to places where the communication can be made with safety to the public, and without injury to the railway and without inconvenience to the traffic thereon, does not relate solely to the structural difficulties of making an opening, but has reference also to difficulties arising from working the traffic on the railway.

Decision of the Railway Commissioners, ante, p. 381, reversed.

APPEAL from a judgment of the Railway and Canal Commissioners, reported ante, p. 381.

The application made to the Railway Commissioners was for an order enjoining the defendants to renew the communication between the applicants' sidings and the defendants' railway, as the same was hitherto used and enjoyed, or otherwise to make such openings in their lines of rails as might be necessary to effect communication between the sidings and the railway. Application was also made for an order as to reasonable facilities for receiving, forwarding, and delivering the applicants' traffic over the defendants' railway from the applicants' sidings.

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LANCASHIRE BRICK AND TERRA COTTA COMPANY v. LANCASHIRE AND YORKSHIRE RAILWAY.

It appeared that the applicants were the owners of thirty-eight acres of land at Baxenden, in Lancashire, adjoining the defendants' railway. A written agreement was entered into in 1894 between the applicants and the railway company by which the latter constructed certain sidings at the expense of the applicants and on their land, and connected them with the railway by means of additional lines of rail laid on the railway company's land. These lines of rail were to be used by the applicants and other the owners or occupiers for the time being of the applicants' land for the accommodation of their traffic. The works were made and were used by the applicants, and also, at a later date, by the Nicholls Chemical Company, who became lessees under the applicants of part of the land. The agreement gave either party a right to put an end to it after five years, and at the expiration of that period the railway company gave notice to terminate the agreement. The applicants were informed that the railway company were willing to make a new agreement similar to the former one, except that it should be limited to the traffic of the applicants and the chemical company. To this the applicants would not agree, and the rails on the railway company's land were taken up, but subsequently restored, pending the litigation, and without prejudice to the right of the railway company to remove them. The application above mentioned was then made by the applicants to the Railway Commissioners, based upon s. 76 of the Railways Clauses Consolidation Act, 1845. (1)

(1) 8 & 9 Vict. c. 20, s. 76: "And be it enacted, that this or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway, but under and subject to the provisions and restrictions of an Act passed in the sixth year of the reign of Her present Majesty, intituled 'An Act for the better regulation of railways, and for the conveyance of Troops'; and the company shall, if required, at the expense of such owners and occupiers and other persons, and subject also to the provisions of the said last-mentioned Act, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon;

Judgment was given for the applicants. (1)
The railway company appealed.

C. A. Russell, K.C., and *Ernest Moon*, for the railway company, in support of the appeal. The agreement with the applicants has come to an end, and they base their application on s. 76 of the Railways Clauses Consolidation Act, 1845. That section, however, as appears from the wording of it and the reference to s. 12 of the Railway Regulation Act, 1842, relates to the owners of branch railways who desire to use the main railway with their own locomotives and carriages. Sect. 92 of the Act of 1845 gave a general right of user over a railway, which was the idea current when railways were a novelty. Sect. 76 introduced certain limitations on that user. Wright J. in his judgment pointed out that this sort of user is incompatible with the conditions now existing with regard to traffic on railways. That is equivalent to saying that the claim of the applicants could not be allowed without disregard of the limitations. The Commissioners, however, took the view that the section had a wider operation, and that the connections should be ordered, and any question of user left open to be dealt with on a separate application. That is to say, that although the applicants were asserting an absolute right which must be subject to the conditions imposed by the section, those conditions were disregarded. Dealing with the traffic of the applicants is quite a different thing from dealing with the traffic that they might bring, over what would practically be

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and the company shall not take any rate or toll or other moneys for the passing of any passengers, goods or other things along any branch so to be made by any such owner or occupier or other person; but this enactment shall be subject to the following restrictions and conditions; (that is to say,)

"No such branch railway shall run parallel to the railway: The company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or bridge, nor in any tunnel: The persons making or using such branch railways shall be subject to all by-laws and regulations of the company from time to time made with respect to passing upon or crossing the railway and otherwise; . . . ."

(1) Ante, p. 381.

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a branch railway, from all the traders to whom they might let land. If the decision appealed from is right, any one who has land adjoining a railway can, by laying down a siding, acquire a right to a connection with the railway and a right of user over the railway. This matter has been before the Court of Session under the corresponding clause (s. 69) of the Railways Clauses Consolidation (Scotland) Act, 1845, in *Cowan & Sons* v. *North British Railway* (1), and it was held that the owner of a private siding to a railway has no other right than a right to use the railway as a highway for his own engines and carriages on payment of tolls. The case of *Hughes* v. *Chester and Holyhead Railway* (2), to which Wright J. referred, was not a case of a siding as suggested, but was the case of an application to make a line under or over the railway.

Foote, K.C., and *Rowland Whitehead*, for the applicants. Supposing that traffic cannot be conveniently run by the traders over the railway, that does not prevent an application under s. 76 to have a communication made. The questions whether the applicants can bring the traffic of other persons over their sidings, and how such traffic as they may bring can be conveniently dealt with, does not arise on this application, but would arise on some future application. It may have been contemplated when this statute was passed that the trader would carry his own traffic over the railway, but that does not disentitle him from requiring the opening to be made, so that he can afterwards apply for reasonable facilities for the carriage of his traffic. The right of user by private owners may be obsolete because the Court could not grant relief, as to do so would involve ordering the performance of a continuous act like working signals, over which the Court could have no control: *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway* (3); but the legal right under s. 92 remains. It cannot be said that s. 92 has been repealed, and if it is still in force application can be made under s. 76. That section speaks of communication with the railway "for the purpose of bringing carriages to or from or upon the railway," and says nothing as

(1) (1901) 3 F. 677; 38 S. L. R. 514.

(2) (1861) 31 L. J. (Ch.) 97.

(3) (1874) L. R. 9 Ch. 331.

to carriages running "on the railway," and this application is confined to communication for the former purpose. When that is obtained there may be application for reasonable facilities, the substitute for the former practice of asking for an injunction, or there may be application on the ground of undue preference. If such sidings as those in the present case can only be obtained by agreement, a number of general clauses of the Railway and Canal Traffic Acts, such as those relating to rebate and terminal charges, would be inapplicable and useless. Conversely the charges allowed by the various confirmation Acts, such as those for services rendered by the railway company at or in connection with sidings not their property, would be inapplicable. The contention on behalf of the applicants is that s. 76 is not limited to the user of the railway by traders with their own rolling stock, and that even if it is held to be so limited the legal right to make an application under the section still remains, and therefore the subordinate right to bring their traffic to the railway to be there dealt with also remains. Further, the objection to the making of openings, on the grounds of safety to the public, injury to the railway or inconvenience to the traffic thereon, relates solely to matters arising out of the structural difficulties of making the connections with the railway: *Richard* v. *Great Western Railway*. (1)

[They cited also *Portway* v. *Colne Valley and Halstead Ry. Co.* (2); *Bell* v. *Midland Railway*. (3)]

C. A. Russell, K.C., in reply.

COLLINS M.R. The case before us arises in this way. The applicants had an agreement with the railway company, made in the year 1894, whereby they acquired the right to have their goods received at and sent from a siding by the defendants' line. That agreement contained a clause by which it was determinable on six months' notice at the end of five years. The land owned by the applicants on a part of which their siding had been made consisted of some thirty-eight acres, and

(1) *The Times*, Nov. 24, 1900.
(2) (1891) 7 Ry. & Can. Cas. 102.
(3) (1859) 3 De G. & J. 673; (1861) 30 L. J. (C.P.) 273.

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after they had been established there for some time with their own works they let a part of it to some persons who set up chemical works, and the railway company, although they were willing to give facilities at the siding for the traffic of the applicants and also for that of the chemical works, were not minded to give facilities in respect of any further works that might be built on the applicants' land. They therefore gave notice to determine the agreement, and for the present purpose it must be taken that the connection between the siding and the line has been taken up, the applicants not having been willing to continue the agreement on the terms which were offered. Thereupon arises the question before us whether under s. 76 of the Railways Clauses Consolidation Act, 1845, the railway company can be forced to make an opening from their line to the applicants' siding. That is the only question before us, because, though on the hearing in the Court below the application was based on other grounds, this single point was the only one discussed and decided.

The side-note to the section fairly expresses the substance of it. It is, "Power to parties to make private branch railways communicating with the railway." By the section it is enacted that "this or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway." The section then refers to the Railway Regulation Act, 1842, and provides that the company, subject to the provisions of that Act, shall "make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public and without injury to the railway, and without inconvenience to the traffic thereon." Then follows the provision that "The company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or

bridge, nor in any tunnel"; and, further, the persons making or using such branch railways are to be subject to the by-laws and regulations of the company. Now, it is admitted as a fact that to allow this section being carried out in its entirety—that is to say, to allow the applicants to have access for the purpose of working their own carriages and wagons on the line—would be to allow that which could not be done with safety to the public and without injury to the railway and without inconvenience to the traffic thereon. That was clearly expressed by Wright J., who pointed out, as appears by the report of this case in the *Law Journal Reports* (1), that it would be out of the question nowadays to suppose that any such traffic could be allowed to be carried upon a public railway working under modern conditions. Therefore I take that as established; and in view of that fact the question arises whether the applicants have nevertheless a right to demand that the railway company shall submit to the making of an opening on their line. I am of opinion that they have not. I think it would be straining the Act of Parliament beyond both its words and its spirit if we were to give to the applicants in this case the right to force an opening to the line, not for the purpose laid down in the Act, or anything like it, but simply to give them a locus standi, so that, having effected a passage into the line, they could come afterwards and ask for reasonable facilities at that point for the receipt and delivery of their traffic. It is quite obvious that the section was passed at a time when a railway was looked upon merely as a particular form of highway, on which all people who had the means of travelling along that particular line of railway should have the right to do so, and from that point of view the section gave certain facilities to persons owning adjoining lands to get access to the line—not access by way of forming a station at that particular point, but access for the purpose of transit. What is now asked is, not that there should be facilities for transit, as contemplated by this section, but that there should be a place, which might be regarded as a station, for the purpose of insisting that it was such a point on the railway that members of the public had a

(1) (1902) 71 L. J. (K.B.) 141.

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right to demand reasonable facilities for receiving, delivering, and forwarding traffic at that place. We have only to look at the legislation of which this section is a part, and to look at the section itself, to see that that is in no sense the object of this particular section. It was, what it purports to be, simply a clause to empower the persons who wanted to run branch lines into the railway to have access to the railway for the purpose of conveying their own traffic over the branch line on to the railway, and vice versâ. That being so, it seems to me to dispose of the case. Whether or not these particular traders have any other remedy, either under the general power of getting facilities under the Traffic Act, or under the undue preference clauses, it is not necessary to consider. The question has been discussed in a Scottish case (*Cowan & Sons* v. *North British Railway* (1)) on both points, and the judges held that there is no jurisdiction in the Court to give to a trader, under the clause of the Railways Clauses Act (Scotland), 1845, which corresponds with s. 76 of the English Act, the right to demand access to a line at a particular point where it does not exist; and that Court has also decided, as I read the judgment, that where the access had existed before under an agreement, and that agreement is determined, there is no jurisdiction to do more than if there never had been any agreement at all. Whether or not that view would prevail if the matter were argued before us, I desire to keep a perfectly open mind. I give no opinion upon that matter; but, for the purpose of deciding this case, it seems to me, on the short grounds I have put, that s. 76 cannot be used simply to make an occasion for demanding facilities under the other Acts. I do not think this case is brought within the section, and for that reason I think this appeal must be allowed.

ROMER L.J. I am of the same opinion. I doubt very much whether it can be said that the applicants have laid down a collateral branch of railway for the purpose of bringing carriages to or from or upon the railway within the meaning of those words as used in the 76th section. But, passing that by, it

(1) 3 F. 677; 38 S. L. R. 514.

appears to me that the argument used on behalf of the applicants as to the limitation of the right of communication contained in s. 76 is not well founded. Passing over the limitations in the earlier part of s. 76, the limitation to be considered is this—the opening can only be made in places where the communication can be made with safety to the public without injury to the railway and without inconvenience to the traffic thereon. It is said that that is limited to the consideration of the difficulty of structural communication only. That is to say, we have only to see whether the openings in the rails and the communications with the rails of the additional line that the railway company has to make can be effected structurally with safety to the railway company's own traffic, or the traffic to come on it from the branch railway. In my opinion that cannot be so. The communication is to be used for the purpose of bringing carriages to or from or upon the railway, and where, in the phrase with which I am now dealing, we find a provision as to places where the communication can be made with safety to the public and so forth, it means the communication previously referred to—that is, a communication by means of which carriages can be brought on to the railway; and it appears to me that it would be an extremely narrow and untrue construction of the section to say that we have not to bear in mind, in considering whether the communication could be made with safety to the public and without injury to the railway and without inconvenience to the public, the possibility of injury and inconvenience arising from the passing of the carriages over the branch railway on to the main railway. It appears to me that that is a thing which must be kept in view. Therefore we have to bear in mind that the question is whether a place is one where communication of that nature ought to be allowed—a communication which presumes the right on behalf of the persons using it to bring their own carriages, if they think fit to do so, on to the railway. Dealing with the section on that basis, it appears to me that we can only answer the question which I have considered, as applied to the case now before us, by saying that the communication cannot be made without the injury and inconvenience that is

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referred to in the section. It appears to me that when in the Court below they came to that conclusion of fact the application of the section ceased. I agree, therefore, that the appeal should be allowed.

MATHEW L.J. I am of the same opinion. The argument in favour of the trader pushed to its legitimate results would lead to very formidable consequences. As I understand, the argument comes to this—that anybody choosing to make a siding to a railway may call upon a railway company to make a communication and to afford facilities for the purpose. Is that the law? Let me deal with this particular case. The arrangements between the trader and the company had their origin in an agreement—in a determinable agreement—and the trader had no right whatever to approach the railway at that point except under the specific agreement. It seems to me to be impossible to convert that agreement, terminable and since put an end to, into something that creates a permanent obligation on the railway company. It is said that this is effected by s. 76. I will not repeat the language of the section. It is as plain as can be. The purpose contemplated by the section was the use of the railway by the trader with his own rolling stock. That was a view upon which a good deal of the earlier legislation with reference to railway companies proceeded. The final clause of s. 76 makes it perfectly clear what is meant. It provides that persons making or using the branch railways shall be subject to all by-laws and regulations of the company from time to time made with respect to the passing upon or crossing the railway or otherwise. It is clear from this that what was contemplated was the use of the railway by the trader. That has no application to this particular case, and for these further reasons I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for applicants: *Neish, Howell & Macfarlane, for B. T. Westwell, Accrington.*

Solicitors for railway company: *Woodcock, Ryland & Parker, for C. Moorhouse, Manchester.*

A. M.

WHITAKER *v.* POMFRET BROTHERS.

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Feb. 25.

Adulteration—Limit of Time for taking Proceedings—False Warranty—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 20—*Sale of Food and Drugs Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 10—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 19; *s.* 20, *sub-s.* 6.

Proceedings under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, against the original vendor of an article of food or drug for giving a false warranty in writing in respect of it to a purchaser, must be commenced within six calendar months from the date of the giving of the false warranty.

CASE stated by justices for Lancashire.

An information had been preferred against the respondents under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, charging that they on May 16, 1901, in respect of an article of food, to wit, pepper, sold by them as principals, did give to the purchaser thereof a false warranty in writing, the said warranty so given stating the pepper to be genuine white pepper, whereas the same contained not less than 10 per cent. of bleached pepper husks. On the hearing of the information the following facts were proved by the appellant, and were not disputed by the respondents.

One John Milne, who carried on business as a retail grocer at Haslingden, purchased on November 20, 1900, from the respondents, who were wholesale grocers, 3 lbs. of white pepper. He purchased the pepper as genuine white pepper, and with a written warranty to that effect given by the respondents. On May 16, 1901, John Milne sold to Serjeant Bland at his shop in Haslingden 6 ozs. of the said pepper. The pepper was bought for the purpose of analysis, and was divided by the purchaser into three parts, and one portion sent to the county analyst; and all the requirements of s. 14 of the Sale of Food and Drugs Act, 1875, were complied with. On being analyzed the pepper was found to contain not more than 90 per cent. of genuine white pepper and not less than 10 per cent. of bleached

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pepper husks, and the analyst gave his certificate to that effect. A complaint was then laid against Milne for selling to the prejudice of the purchaser an article of food, to wit, pepper, not of the nature, substance, and quality demanded by the purchaser. The complaint was heard on June 24, 1901, when Milne proved to the satisfaction of the justices that he had purchased the pepper as the same in nature, substance, and quality as that demanded of him by the prosecutor and with a written warranty to that effect, to wit, the warranty dated November 20, 1900, and that he had no reason to believe at the time he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it. The justices thereupon dismissed the information against Milne under s. 25 of the Sale of Food and Drugs Act, 1875.

It was contended on behalf of the respondents (*a*) that apart from the evidence relating to the warranty dated November 20, 1900, no evidence had been offered to the justices of the giving of a false warranty by the respondents on May 16, 1901; (*b*) that the offence (if any) was committed on November 20, 1900, when the warranty was given and the pepper sold to Milne; (*c*) that the information having been laid on July 6, 1901 (more than six months after November 20, 1900), was not within the time specified in 11 & 12 Vict. c. 43, s. 11.

It was contended on behalf of the appellant (*a*) that the warranty given by the respondents was a continuing warranty running on until the whole of the pepper covered by it had been disposed of, and that the offence was a continuing offence; (*b*) that the warranty was in force on May 16, 1901, when Milne sold a portion of the pepper to Bland, and that the warranty protected Milne from conviction; (*c*) that the information was laid on July 6, 1901, and within six months of May 16, 1901, the date of the sale to Bland, on which date the warranty came into force for the purpose of the particular purchase, and therefore within the time specified by 11 & 12 Vict. c. 43, s. 11.

The justices were of opinion that the prosecution was not brought in time under 11 & 12 Vict. c. 43, s. 11.

The question of law for the opinion of the Court was whether the information was laid in time. (1)

F. H. Mellor, for the appellant. The information was laid in time. Under s. 20 of the Act of 1875, penalties under the Act are made recoverable as under 11 & 12 Vict. c. 43, which fixes the limit of time at six months from the arising of the matter of complaint. But s. 10 of the Act of 1879 provided that all prosecutions under the Act were to be commenced within a reasonable time, and in the case of perishable articles not more than twenty-eight days after the purchase for test purposes; the limit of twenty-eight days was, however, held not to apply to a prosecution of the original vendor for giving a false warranty: *Cook* v. *White* (2); under that section, therefore, the proceedings against the warrantor had to be taken within a reasonable time. That section was repealed by the Act of 1899, s. 19 of which was substituted for it. In repealing s. 10 of the Act of 1879 the Legislature has kept alive the twenty-eight days' limit for proceedings against the retail seller, and has substituted the six months' limit under

(1) By 38 & 39 Vict. c. 63 (The Sale of Food and Drugs Act, 1875), s. 20, "Every penalty imposed by this Act shall be recovered in England in the manner prescribed by the eleventh and twelfth of Victoria, chapter forty-three."

By 11 & 12 Vict. c. 43, s. 11, complaint must be made and information laid "within six calendar months from the time when the matter of such complaint or information respectively arose."

By 42 & 43 Vict. c. 30 (The Sale of Food and Drugs Act, 1879), s. 10, "In all prosecutions under the principal Act, and notwithstanding the provisions of s. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug . . . ."

By 62 & 63 Vict. c. 51 (The Sale of Food and Drugs Act, 1899), s. 10 of the Act of 1879 is repealed, and s. 19, sub-s. 1, provides that "When any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof, notwithstanding anything contained in s. 20 of the Sale of Food and Drugs Act, 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase."

(2) [1896] 1 Q. B. 284.

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11 & 12 Vict. c. 43 for the reasonable time mentioned in s. 10; the result is that the six months begins to run from the date of the sale to the sub-purchaser for purposes of analysis, or from twenty-eight days after that date.

[LORD ALVERSTONE C.J. Is not the matter of complaint the giving of the warranty?]

That is the foundation of the complaint, but the time runs from the date of the discovery that the warranty was false. The warranty only becomes effective as to goods resold under it when they are in fact resold; it is in effect a continuing warranty, for, as long as the shopkeeper is entitled to set up the warranty, so long does the warranty attach to the goods; and the offence is a continuing offence, for it is in the nature of a concealed fraud.

Frank Mellor, for the respondent. Sect. 20 of the Act of 1875, which is the first section dealing with the limit of time for taking proceedings, brings in the provisions of 11 & 12 Vict. c. 43, s. 11; sect. 10 in the Act of 1879 and s. 19 of the Act of 1899 cut down the time rather than enlarge it.

[He was stopped by the Court.]

LORD ALVERSTONE C.J. I cannot avoid feeling regret that upon the point taken on behalf of the respondents these proceedings must fail for the reasons pointed out by Kay L.J. in *Cook* v. *White* (1), and that in the case of non-perishable articles, which have been kept by the purchaser over six months before resale, proceedings cannot be taken against the original vendor who has sold them with a false warranty. That is a matter, however, which must be put right, if at all, by the Legislature.

The case stands thus. Under s. 20 of the Act of 1875 it is provided that in proceedings against offenders every penalty imposed by the Act is to be recovered in England in the manner prescribed by 11 & 12 Vict. c. 43; that section, therefore, brings in the provisions of Jervis' Act in regard to proceedings against offenders. Then came the repealed section

(1) [1896] 1 Q. B. 284.

(s. 10) of the Act of 1879, which provided in substance that prosecutions under the Act of 1875, notwithstanding the provisions of s. 20 of that Act, must be commenced within a reasonable time, and in the case of a perishable article within twenty-eight days from the time of its purchase. That is extended by the Act of 1899, so far as regards the twenty-eight days' limit, to both perishable and non-perishable articles. The result is that, as regards the proceedings taken in respect of the sale to the sub-purchaser, a limit of time is imposed which is less than the six months under Jervis' Act.

In order to enable these proceedings to be taken with effect against the warrantors there must be some statutory provision which either directly or by implication excludes the operation of s. 20 in regard to this particular offence. Looking at the language of s. 20, sub-s. 6, of the Act of 1899, I think that it is not sufficient for that purpose. The sub-section runs thus: "Every person who in respect of an article of food or drug sold by him as principal or agent gives to the purchaser a false warranty in writing shall be liable on summary conviction for the first offence to a fine not exceeding 20*l*." It seems to me that these words, which create the offence, directly correspond with the class of offence to which it was intended that the limits of time laid down by s. 20 of the Act of 1875 should apply. If it had been intended to exclude the general limits of time which were brought in by the incorporation of the provisions of Jervis' Act, I should expect to find special words defining the time within which such proceedings as these might be taken; there might, for instance, be a limit of time from the date of the sale of the article to the sub-purchaser, or there might be a direction that, for the purpose of a summons under that sub-section, the date of the sub-purchase should be taken to be the date when the false warranty was given. It seems to me impossible to give proper effect to s. 20 of the Act of 1875 if we hold that these proceedings could be taken more than six months from the date of the offence—that is, the offence of selling the goods upon the false warranty. If, therefore, it is desired to authorize the taking of proceedings

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against a person who has given a false warranty more than six months before, I think that it must be done by legislation, and not by putting a construction on an existing Act of Parliament which its language does not justify.

DARLING and CHANNELL JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Snow, Fox & Higginson, for Harcourt Clare, Preston.*

Solicitors for respondent: *Williamson, Hill & Co., for Marsden & Marsden, Blackburn.*

W. J. B.

1902
Feb. 28.

DAVIES *v.* BURNETT.

Licensing Acts—Offences—Selling by Retail without Licence—Club—Sale to Agent of Member—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

Where intoxicating liquor is sold by a servant of a bonâ fide workingmen's club, not licensed for the sale of intoxicating liquors, to the duly authorized agent of a member for consumption by the member off the club premises, no offence is committed against s. 3 of the Licensing Act, 1872, and the seller cannot be convicted for selling intoxicating liquors by retail without a licence.

CASE stated by justices for the borough of Wolverhampton.

An information had been preferred by the respondent against the appellant under s. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), charging him with unlawfully selling by retail intoxicating liquor which he was not then licensed to sell by retail. On the hearing of the information the following facts were proved or admitted:—

The appellant was a waiter employed at the North Wolverhampton Working Men's Club, a bonâ fide club, duly registered under the Friendly Societies Act, 1875, whose registered office and place of business were at premises in the said borough. About 8.35 P.M. on August 9, 1901, Elizabeth Hickman, the wife of George Hickman, went to the club, asked the defendant

for a bottle of stout for her husband, and handed to him the following ticket, partly printed and partly written :—

Name of Article and Quantity must be stated.

To the Steward.

North Wolverhampton Working Men's Club.

Aug. 9th, 1901.

Please supply Bearer with 1 Stout.

for

Member's Signature } G. Hickman.

Member's No. —355.

The appellant thereupon for and on behalf of the club sold or transferred to Elizabeth Hickman from the stock of intoxicating liquors, the property of the club, a bottle containing stout, in exchange for which she paid or handed over to him on behalf of the club the sum of twopence. The ticket had been filled in by, and was signed by, George Hickman, the husband of Elizabeth Hickman, who was then at his home; and Elizabeth Hickman, on receiving the stout from the appellant, returned home with it and handed it to her husband, who drank it. George Hickman was a duly elected member of the club, but Elizabeth Hickman was not a member.

It was contended on behalf of the appellant that inasmuch as Elizabeth Hickman was acting as agent for her husband, George Hickman, a bonâ fide member of the club, there was in consequence no sale to a non-member, but merely a transfer of the special property in the goods of the club to one of the members, and that therefore no licence was required by the appellant for the sale of intoxicating liquor.

It was contended on behalf of the respondent that the principal objects of the club were "to afford to its members a means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation"; and that if a member, not being on the premises, could send any person, not being a member, to such a club to purchase intoxicating liquor, the objects of the club would be entirely defeated, and the licensing laws evaded.

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The justices found upon the above facts that there had been a sale to a non-member, and convicted the appellant.

The question of law for the opinion of the Court was whether upon the facts stated the appellant committed an offence against s. 3 of the Licensing Act, 1872, and was rightly convicted.

Hobson, for the appellant. The conviction was wrong. There was no sale by retail of intoxicating liquors within the meaning of s. 3 of the Licensing Act, 1872. It is clear that the member of a bonâ fide club, as this is found to be, may pay for intoxicating liquors supplied by the club and carry them home for consumption; there is in such a case no sale: *Graff* v. *Evans*. (1) The wife received the bottle of stout as agent for her husband, who was entitled to take it away for consumption at home, and the ordinary law of agency should apply. It is true that in *Woodley* v. *Simmonds* (2) a conviction under s. 3 was upheld where a married woman fetched intoxicating liquor from a club for her husband; but that decision did not in any way turn upon the question of agency, it being obvious that the story told was disbelieved by the Court.

Arthur Powell, for the respondent. On the assumption that the case intends to find that the wife was the husband's agent, there is no power in the member of a club to send an agent to fetch intoxicating liquors from the club for consumption off the premises; he must act in person. To hold otherwise would open a wide door for evasion of the Act.

LORD ALVERSTONE C.J. With very great reluctance I have come to the conclusion that this appeal must succeed, for I think that the practice of the delivery of beer by a bonâ fide club to its members for consumption off the premises is one that should be discountenanced; I agree with the respondent's counsel that clubs are substantially kept for the enjoyment by the members of their privileges upon the premises. But we have here to decide a question of law. The justices have found that this was a bonâ fide club. In my mind an important

(1) (1882) 8 Q. B. D. 373. (2) (1896) 60 J. P. 150.

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element in the determination of the bona fides of a club would be whether a practice prevailed of delivering intoxicating liquor to members for consumption off the premises, but in the present case we cannot go behind the finding. It appears that the member's wife asked the appellant for a bottle of stout, and handed to him a ticket which had been filled in and signed by her husband, who was at home, and that she returned home with the stout and handed it to her husband, who drank it. It is agreed that in all that she did the wife was acting as her husband's agent. It seems impossible to say that a member of a club may not by his lawful agent carry out a transaction which in *Graff* v. *Evans* (1) was held to be legal when done by the member himself, and I think that no offence was committed in the present case, because what was done amounted to a transfer of property by means of an agent, which the law holds to be justifiable. The decision in *Woodley* v. *Simmonds* (2) in no way conflicts with the view which I am expressing, for it was based upon the ground that there was not a bonâ fide dealing with the club's property by the member. This appeal must, therefore, succeed.

DARLING J. I agree, and with extreme reluctance, that this appeal must be allowed, for one can very well see how such a practice as that which we are considering may be the means of supplying persons with drink who are not entitled to get it. The case stated assumes that the wife was acting as agent for her husband, and I think that in acting as he did the appellant was not committing an offence. But the practice is most inexpedient, and I should be very glad to hear that it had been stopped.

CHANNELL J. On the findings of fact in the case I agree with the judgments that have been pronounced. But if a case were to come before me from which it appeared that by the rules of the club the members were allowed to take away intoxicating liquors for consumption off the premises, I think that that fact would go a very long way to shew that it was

(1) 8 Q. B. D. 373. (2) 60 J. P. 150.

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not a bonâ fide club. As it is, the decision of the justices must be reversed.

Appeal allowed.

Solicitors for appellant: *Harrison & Davies, for Hooper & Ryland, Birmingham.*

Solicitors for respondent: *Indermaur & Brown, for A. Turton, Wolverhampton.*

W. J. B.

1902

Feb. 25.

COX *v.* BLEINES.

Bread—Sale otherwise than by Weight—3 Geo. 4, c. cvi., s. 4.

By 3 Geo. 4, c. cvi., s. 4 (which applies in substance to the metropolitan area), any baker or seller of bread who sells, or causes to be sold, bread in any other manner than by weight is liable to a penalty.

A servant of the respondent, a baker, was asked by a purchaser for a half-quartern loaf, and served him with a loaf and two rolls, for which he paid 2*d.* The loaf and rolls were in the purchaser's presence placed in the pan of a pair of scales, in the opposite scale of which there was already a 2 lb. weight; the beam of the scales did not move, and the weight of the loaf and rolls was not ascertained at the time of sale beyond the clear fact that they weighed less than 2 lbs. On being taken away by the purchaser and weighed, they were found to weigh 5 ozs. short of 2 lbs.:—

Held, that a sale by weight meant a sale by the true weight of the bread sold, and that the respondent had sold bread otherwise than by weight within the meaning of the section.

CASE stated by a metropolitan police magistrate upon an information laid by the appellant against the respondent, charging him with having unlawfully sold, or caused to be sold, bread in other manner than by weight, contrary to 3 Geo. 4, c. cvi. (The London Bread Act, 1822).

The respondent carried on the business of a baker and seller of bread. By the direction of the appellant, who was an inspector of weights and measures, one Murrell went into the respondent's shop and asked Alice Culham, who was in the respondent's employment and was serving his customers, for a half-quartern loaf; she thereupon supplied him with a loaf and two rolls, for which he paid the sum of 2*d.* Before handing the loaf and rolls to Murrell she placed them in the pan

of the shop scales, the loaf first and the two rolls afterwards on the top of it. The loaf and rolls did not carry the scale down, though they would have done so if they had weighed more than the 2 lb. weight which was already in the other scale. The beam of the weighing machine did not move at all, and the weight of the loaf and rolls was not, nor had been, ascertained at the time of the sale to Murrell, except that it was clearly apparent that the total quantity of bread on the scale weighed less than 2 lbs. The loaf and rolls were then taken away by Murrell and weighed by the appellant, who found their aggregate weight to be 5 ozs. short of 2 lbs.

The appellant contended that the bread had been sold in other manner than by weight, especially as the actual weight had not been in any way ascertained either at the time of or before the sale.

The finding of the magistrate was in the following terms: "I was of opinion that the bread was not sold otherwise than by weight. It was sold neither by denomination nor by measure, as two additional rolls were sold with the half-quartern loaf. The appellant did not suggest what mode of sale there could possibly be in this case other than by weight. It seemed to me that directly the bread was placed on the scales it was recognised by both parties to the contract that the sale was to be by weight, and it made no difference even if the bread was afterwards imperfectly or fraudulently weighed. I was, however, further of opinion that not only was the bread thus sold by weight, but that it was actually weighed. It was weighed in the balance and found wanting. It was not necessary that the beam should be disturbed in order that the process of weighing should be complete. If more than 2 lbs. of bread is first placed upon the scale and a 2 lb. weight is afterwards put upon the other scale, the beam would not be disturbed, yet it could not be said then that the bread had not been weighed. It is sufficient in a transaction of this sort to ascertain whether bread is above or below a certain weight without determining the exact number of ounces or grains. If the respondent's servant in weighing the bread had committed a fraud, she could have been prosecuted under s. 26 of

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the Weights and Measures Act, 1878; but I was clearly of opinion that the offence charged had not been committed, and I therefore dismissed the summons subject to this case."

The question of law for the opinion of the Court was whether the sale was a sale in other manner than by weight within the meaning of s. 4 of the London Bread Act, 1822. (1)

Daldy, for the appellant. The magistrate was wrong. There was no evidence upon which he could properly find a sale by weight within the meaning of the section.

[CHANNELL J. Does selling by weight mean selling by the true weight?]

Yes; the Legislature intended to enforce a very strict sale by weight. It is not enough to weigh the dough beforehand with an allowance for shrinkage; the bread itself must be weighed: *Jones* v. *Huxtable* (2); *London County Council* v. *Read*. (3) The purchaser was entitled to a definite weight of bread, and all that either the seller or the purchaser could know was that the weight was under 2 lbs.; that is not in any fair sense of the term a sale by weight. The price of the bread was not fixed with reference to its weight. [He also cited *Williams* v. *Deggan* (4); *Mitton* v. *Troke*. (5)]

The respondent did not appear.

LORD ALVERSTONE C.J. It is unfortunate that this case has not been argued on behalf of the respondent. I think that the contention of the appellant is right, and that there is no evidence of a sale by weight within the construction put upon that expression by the decided cases. The view which I

(1) By 3 Geo. 4, c. cvi., s. 4, it is provided that "all bread sold within the limits aforesaid shall be sold by the several bakers or sellers of bread respectively within the said limits by weight; and in case any baker or seller of bread within the limits aforesaid shall sell, or cause to be sold, bread in any other manner than by weight, then and in such case every such baker or seller of bread shall, for every such offence, forfeit and pay any sum not exceeding forty shillings . . . ."

The "limits aforesaid" referred to in the section are "the City of London and the liberties thereof, the weekly bills of mortality, and within ten miles of the Royal Exchange."

(2) (1867) L. R. 2 Q. B. 460.

(3) [1900] 1 Q. B. 288.

(4) (1867) 16 L. T. (N.S.) 492.

(5) (1869) 20 L. T. (N.S.) 563.

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expressed during the argument to the effect that a man purported to sell bread by weight because he put it in the scales is, I think, wrong. The statute is fairly open to the construction that it intended to distinguish between carrying on the trade of selling by weight and carrying on the trade of selling by other means, but the decisions amount to this—that the weight of the quantity of bread sold for a particular price must be ascertained, either before it is sold or exposed for sale, or else, if necessary, in the presence of the purchaser. In the present case all that happened was that bread which did not weigh 2 lbs. was put in the scale; it did not move the beam, and its weight was never ascertained at all; under these circumstances I think that there was no evidence on which the learned magistrate could properly come to the conclusion that the bread had been weighed at all, or that its weight had been ascertained, or that it had been sold by weight; for the purchaser asked in effect for a 2 lb. loaf, and something else was delivered, whereas what ought to have been delivered was bread which had been weighed, or of which the weight had been ascertained, so that it was sold by weight. At first I was impressed by the magistrate's view that the real offence was representing the weight of the bread to be 2 lbs. when it was not 2 lbs., and that that was quite consistent with the sale having been a sale by weight. I think, however, that that is a wrong view, and that the statute, construed by the light of previous decisions, means that the weight of the parcel of bread sold must be ascertained. That being so, I am of opinion that in this case there was no evidence that the weight of the parcel of bread sold was ascertained at all. The case must therefore go back to the magistrate with a direction that the respondent ought to be convicted.

Darling J. I am of the same opinion, and if I add a word to the judgment of my Lord it is only because I think it necessary to guard against this: that I do not think our decision means that in order that there should be a sale by weight it is not absolutely necessary that there should be an

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Darling J.

ascertainment of the true weight, because, if we held that, then some one who might be prosecuted for not having sold by weight might escape the penalty for the offence by saying, "Oh, yes; I weighed it, although I weighed it with false scales or false weights." It seems to me that it is necessary in order to decide this point to decide what "to weigh" means. I think that "to weigh" means to affect to ascertain weight by means of balancing—using what may be properly called a balance—although the instrument be fraudulently used. Still, one might weigh a thing and sell it, and yet not sell it by its weight. There would be a weighing, and then a selling otherwise than by weight.

Channell J. I agree that this appeal must be allowed. Looking at s. 4 of the Act, I think that it would be perfectly possible to put two meanings upon the words which require a sale of bread to be by weight. In the first place, selling by weight might mean merely selling by weight as distinguished from selling by some other mode, such as by measure, or a supposed measure, or by the particular loaf, or by price; that is to say, the words may refer only to the mode in which the seller is to carry on his business. If it were held that it was only intended to prevent a sale by measure or by price, the consequence would be that, if the seller professed to sell his bread according to weight, and not according to some other mode of pricing it, he would comply with the statute, and it would follow on such a construction that the consideration of whether the weight purported to be sold was the true weight of the bread or not was in no way material. Of course, if the seller purported to sell as a 4 lb. loaf a loaf which did not weigh 4 lbs., he might be proceeded against for fraud, apart altogether from the section under consideration. At the beginning of the argument I thought that it was possible to take that view of the section, but it is clear that the authorities cited to us are entirely opposed to it. The decision in *Jones* v. *Huxtable* (1) clearly involves the contrary: it shews that this section has been judicially interpreted to mean that each particular loaf

(1) L. R. 2 Q. B. 460.

must be sold according to the weight of that particular loaf—that is to say, that selling by weight in the statute means selling by the true weight of the bread sold, and it follows that it is contrary to the meaning of the section to do what has been done here, whether it was owing to fraud, or to an accident, or to carelessness on the part of the person selling; the loaf was not sold according to its true weight, but was sold as being a 2 lb. loaf, when it was in fact 5 ozs. short. The learned magistrate clearly took the first of the two views of the meaning of the Act which I have endeavoured to express, and the cases clearly shew that that is the wrong view. If there were no authority upon the point the view of the learned magistrate would require very careful consideration, as in my opinion there is much to be said for it, but having regard to the authorities which have been cited to us I have no doubt that his decision was wrong. I think he was right in saying that it is sufficient to ascertain that the weight was above the weight professed to be sold, without ascertaining the exact number of ounces or grains, but wrong in saying that it is sufficient to ascertain that it is below the weight professed to be sold. In the latter case there is a sale in other manner than by weight within the meaning of those words as interpreted by the cases, because there is no sale by the true weight.

Appeal allowed.

Solicitor for the appellant: *W. A. Blaxland.*

W. J. B.

1902

Jan. 13; *Feb.* 1.

TAYLOR *v.* HOLLARD.

Limitations, Statute of—Action on Judgment—Part Payment—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

In 1884 the plaintiff recovered judgment against the defendant in England for 15,067*l.* 9*s.* 11*d.*; in 1886 he brought an action upon the judgment in the Courts of the South African Republic, where the defendant was domiciled. The foreign Court refused to enforce the judgment in full, but gave judgment for the plaintiff for the sum (including interest) of 9635*l.* 4*s.* 6*d.* Sequestration proceedings were then taken against the defendant in South Africa, and eventually the 9635*l.* 4*s.* 6*d.* was paid to the plaintiff by the curators under the defendant's sequestration and insolvency, and the defendant was released from all debts claimable against his estate. In 1900 the plaintiff brought an action in England against the defendant to recover the balance remaining due under the original judgment and interest thereon:—

Held, that, the action not having been brought within the period of twelve years prescribed by s. 8 of the Real Property Limitation Act, 1874, the plaintiff's right to recover was barred by that section, and that the part payment of the 9635*l.* 4*s.* 6*d.* did not operate to take the case out of the statute, it not having been made under circumstances from which an acknowledgment of liability and a promise to pay the balance could be inferred:

Held, further, that the plaintiff had elected to take the foreign judgment in discharge of his whole cause of action, and could not afterwards sue for the residue of the original judgment debt in England.

ACTION tried before Jelf J. without a jury.

The facts are set out at length in the judgment, and are summarized in the head-note; it is unnecessary to recapitulate them here. The proceedings between the plaintiff and defendant in the Courts of the South African Republic, to which reference is made in the present report, have been fully reported: see *Taylor* v. *Hollard.* (1)

Herbert Reed, K.C., and *Compton-Smith*, for the plaintiff. It is admitted that, the action having been brought more than twelve years after the date of the judgment sued upon, s. 8 of the Real Property Limitation Act, 1874, is a bar to the plaintiff's right to recover, unless something has happened to take the case out of the operation of the statute: *Jay* v.

(1) (1886) 2 Kotze & Barber, 78.

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Johnstone. (1) But the case is taken out of the statute by the payment of 9635*l.* 4*s.* 6*d.* under the bankruptcy proceedings in South Africa, which was a good payment on account of the English judgment: *Jackson* v. *Fairbank* (2), which is not inconsistent with *Ex parte Topping.* (3)

Macaskie, K.C., and *Lewis Thomas*, for the defendant. The payment was not sufficient to take the case out of the statute, for it was not made on account of the English, but of the South African, judgment. Part payment, in order to take a case out of the statute, must be made under circumstances which warrant the inference of a promise to pay the residue: *Wainman* v. *Kynman.* (4) A promise to pay the principal cannot be inferred even from payment of interest: *Morgan* v. *Rowlands* (5); nor from payment of a dividend in insolvency proceedings: *Davies* v. *Edwards* (6); there must be a promise express or implied to pay the principal. *Jackson* v. *Fairbank* (2) is in effect overruled by *Ex parte Topping* (3) and *Davies* v. *Edwards.* (6) No acknowledgment of liability or promise to pay can be inferred from a payment which is not voluntary, but which is only by way of execution of a hostile judgment. Secondly, the payment in South Africa by the defendant's trustees in insolvency operated as a satisfaction of the English judgment, for the plaintiff must be taken to have elected to take the foreign judgment in discharge of his whole cause of action against the defendant: *Barber* v. *Lamb.* (7) Thirdly, the defendant was released from his liability under the English judgment by the insolvency proceedings taken in South Africa; the decision in *Gibbs* v. *Société Industrielle* (8) is not an authority to the contrary.

[They also cited *In re England.* (9)]

Herbert Reed, K.C., in reply, cited *Warrender* v. *Warrender* (10); *Simpson* v. *Fogo.* (11)

Cur. adv. vult.

(1) [1893] 1 Q. B. 25, 189.
(2) (1794) 2 H. Bl. 340.
(3) (1865) 34 L. J. (Bank.) 44.
(4) (1847) 1 Ex. 118.
(5) (1872) L. R. 7 Q. B. 493.
(6) (1851) 7 Ex. 22.
(7) (1860) 8 C. B. (N.S.) 95.
(8) (1890) 25 Q. B. D. 399.
(9) [1895] 2 Ch. 820.
(10) (1835) 2 Cl. & F. 488; 37 R. R. 188.
(11) (1860) 1 J. & H. 18.

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TAYLOR v. HOLLARD.

Feb. 1. The following written judgment was delivered by

JELF J. This was an action tried before me without a jury on January 13 last, whereby the plaintiff sought to recover from the defendant the sum of 8515*l.* 5*s.* 4*d.*, balance alleged to be due for principal and interest on a judgment obtained by the plaintiff against the defendant in the Queen's Bench Division of the High Court, dated June 28, 1884, for 15,067*l.* 9*s.* 11*d.*, including costs. Three defences were relied upon by the defendant: (1.) That the Statute of Limitations (the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 8) was a bar to the action, as more than twelve years had elapsed between the date of the judgment (June 28, 1884) and the date of the writ in this action (August 7, 1900). (2.) That on May 12, 1886, the plaintiff obtained judgment in the Courts of the then South African Republic (the Transvaal) against the defendant for 7000*l.* and interest thereon at 8 per cent., and costs for the same cause of action as that now sued upon, and took proceedings there for sequestration, and received from the defendant's trustees in insolvency 9635*l.* 4*s.* 6*d.* in respect thereof, and thereby the said judgment now sued upon was merged or satisfied. (3.) That the defendant was released from the cause of action now sued upon by the sequestration and insolvency proceedings in the Transvaal.

As to the plea of the Statute of Limitations, the plaintiff's counsel formally contended that the case was governed, not by 37 & 38 Vict. c. 57, s. 8, which makes the period twelve years, but by 3 & 4 Will. 4, c. 42, s. 3, which makes the period twenty years. But they admitted that since the case of *Jay* v. *Johnstone* (1) they could only rely on this point in the House of Lords. It was further argued on behalf of the plaintiff that the case was taken out of the statute by a part payment within twelve years of 9635*l.* 4*s.* 6*d.* on account of the debt under the circumstances hereinafter appearing.

The defendant was formerly an official in the Transvaal for the then South African Republic, and was domiciled there; but, being temporarily in England, he borrowed money from

(1) [1893] 1 Q. B. 25, 189.

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the plaintiff, contracting to repay the loan with a very heavy bonus, recoverable in England, where there were no usury laws in force. On his failure to pay he was sued in the Queen's Bench Division by the plaintiff, who recovered against him the judgment sued upon in this action. In September, 1886, the plaintiff sought to enforce the judgment against the defendant, who had then returned to the Transvaal, in the Courts of the South African Republic. The action was brought to recover the 15,067*l.* 9*s.* 11*d.* and interest upon the English judgment. The Transvaal Court, presided over by Kotzé C.J., instead of either giving judgment for the amount of the English judgment or refusing to enforce it at all, took a middle course. They inquired into the merits of the original cause of action to the extent of finding that only 7000*l.* had been actually lent by the plaintiff to the defendant, and that the rest of the 15,067*l.* 9*s.* 11*d.* had substantially consisted of a bonus by way of interest on the loan, and refused, whether rightly or wrongly it is not for me to determine, to give judgment for the whole amount, holding such bonus to be usurious and unconscionable, and not enforceable by the law of the South African Republic; but gave judgment for 7000*l.* and interest at 8 per cent. from the date of the English judgment (instead of 4 per cent., the amount of interest which would be recoverable in this country), making a total of 9635*l.* 4*s.* 6*d.* The plaintiff thereupon took proceedings in the Courts of the South African Republic for sequestration, and curators or trustees were appointed by the Transvaal Courts. The estate would not pay all the claims of creditors against the defendant, amounting to 12,000*l.* The defendant then availed himself of a payment made on his behalf by another person (Mr. Sivewright) to the curators of 12,350*l.* 15*s.* 11*d.*, and undertook to be responsible for any further liabilities. The 9635*l.* 4*s.* 6*d.* was then paid in full by the curators to the plaintiff's agents, and ultimately the sequestration and insolvency were annulled, and the defendant was rehabilitated and released from all debts claimable against his estate.

It was contended for the plaintiff that this payment of 9635*l.* 4*s.* 6*d.* took the case out of the statute. The defendant's

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counsel, on the contrary, contended, first, that payment was not made on account of the English judgment, but on account, or, rather, in satisfaction of, the South African judgment; secondly, that it was not made by the defendant or his agent; and, thirdly, that it was not such a payment as is contemplated by the statute, not being one from which an acknowledgment of liability and a promise to pay the residue of the English judgment could be inferred.

I am of opinion that the defendant's contention is correct on all three grounds. The payment was not made on account of the English judgment, which, in my opinion, was necessary in order to take the case out of the statute, but in satisfaction of the Transvaal judgment; and, if this is a question of fact, I so find. Taking the other two grounds together, as they are very closely connected with one another, I find that the payment, though the defendant took advantage of it and obtained his release by means of it and spoke of it as made by him, was not in fact made by him or by any agent of his, but by the curators under his sequestration out of moneys found by Mr. Sivewright; and it was not in fact made voluntarily, but by way of execution of a hostile judgment obtained against the defendant "in invitum." Under these circumstances I think it is impossible to infer from the payment of the 9635*l.* 4*s.* 6*d.* an acknowledgment by the defendant or any agent of his of a further liability or a promise on his part or on the part of any agent of his to pay the residue of the English judgment. This being so, I am of opinion that there was no part payment of such a kind as to take the case out of the statute. The old case of *Jackson* v. *Fairbank* (1), decided in 1794, was relied on by the plaintiff's counsel to shew that a payment by a trustee in bankruptcy may be sufficient. But I consider that that case has been practically overruled by *Davies* v. *Edwards* (2) (1851) and *Ex parte Topping* (3) (1865), and is, I think, inconsistent with other modern decisions. An attempt was made on behalf of the plaintiff to establish a distinction between 3 & 4 Will. 4, c. 27, s. 40, and 37 & 38 Vict. c. 57, s. 8,

(1) 2 H. Bl. 340.

(2) 7 Ex. 22.

(3) 34 L. J. (Bank.) 44.

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and to shew that the latter statute made the fact of a part payment ipso facto sufficient, without the necessity of shewing that it was made under circumstances from which an admission of liability and a promise to pay could be inferred. The only difference, however, in the wording of the two statutes is in the substitution of the period of twelve years for twenty, and Lord Esher, then Brett L.J., in *Harlock* v. *Ashberry* (1) says: "In all Statutes of Limitations the principle on which they are founded is, that in those cases in which a payment is allowed to take the case out of the operations of the Statute of Limitations it must be such a payment as amounts to an acknowledgment of liability." And Sir G. Jessel M.R. emphasizes the same proposition. For these reasons I hold that the Statute of Limitations is a complete bar to this action.

I am further of opinion that the second defence relied on by the defendant is established. If the plaintiff had merely obtained judgment in the Transvaal, and finding it was for 9635*l.* 4*s.* 6*d.* instead of 15,067*l.* 9*s.* 11*d.* had not taken any step to realize that judgment, he could, I think, have sued afterwards in this country for the original debt. But, in my opinion, when he accepted the judgment with its distinct incidents (i.e., the bonus struck off, but 8 per cent. instead of 4 per cent. put on), and proceeded to sequestration and ultimately obtained the 9635*l.* 4*s.* 6*d.* in full, I think he had elected to take the judgment of the foreign country to which he had appealed in discharge of the whole cause of action, and could not afterwards sue for the residue of the debt in England. What he wants to do is to take from the foreign Court the judgment which that Court gave for the whole cause of action, and treat it as a part payment and sue for the residue here. To do this would be to approbate and reprobate, or, in more homely language, to blow hot and cold, which neither law nor common sense will allow. See *Barber* v. *Lamb* (2), where Erle C.J. says: "It would be contrary to all principle for the

(1) (1882) 19 Ch. D. 539, at p. 548.

(2) 29 L. J. (C.P.) 234; 8 C. B. (N.S.) 95.

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party who has chosen such tribunal and got what was awarded to seek a better judgment in respect of the same matter from another tribunal."

In my opinion, the third defence fails, as the release in the foreign country could not per se get rid of a cause of action arising out of a contract to be performed in this country. See Dicey's Conflict of Laws (1896), R. 113, p. 451; *Gibbs* v. *Société Industrielle, &c.* (1) But, for the reasons above set forth, I think the other two defences are sound, and I give judgment for the defendant with costs.

Judgment for the defendant.

Solicitors for plaintiff: *Hurford & Taylor.*
Solicitors for defendant: *Lewis & Lewis.*

W. J. B.

C. A.

1902

March 14.

[IN THE COURT OF APPEAL.]

SKENE *v.* COOK.

Limitations, Statute of—Land Tax—Redemption—Annual Sum payable by way of Interest—Charge on Premises—Land Tax Redemption Act, 1802 (42 *Geo.* 3, *c.* 116), *ss.* 123, 125—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *ss.* 1, 8.

The lessee of premises redeemed the land tax charged thereon under the Land Tax Redemption Act, 1802, which, by s. 123, provides that, where any person, having any estate (other than an estate of inheritance) in any lands, tenements, or hereditaments, redeems the land tax charged thereon, such lands, tenements, or hereditaments shall be chargeable for his benefit with the amount of the moneys paid as the consideration for the redemption of such land tax, and with the payment of a yearly sum of money by way of interest thereon, equal in amount to the land tax redeemed. In 1879 the lessee assigned to the plaintiff the benefit of the contract for redemption of the land tax. No yearly sum having been paid by way of interest on the money paid for the redemption of the land tax since 1879, the plaintiff sued the defendant, in whom the lease of the premises had become vested in 1885, to recover 9*l.* as a yearly payment due January 1,

(1) 25 Q. B. D. 399.

1900, under s. 123 of the before-mentioned Act, by way of interest on the money paid for redemption of the land tax :—

Held, that the case came either within s. 1 of the Real Property Limitation Act, 1874, or within s. 8 of that Act, and therefore the plaintiff's claim was barred.

APPEAL from the judgment of a Divisional Court (Channell and Bucknill JJ.) dismissing an appeal from a county court. (1)

The action was brought in the Westminster County Court to recover the sum of 9*l.*, as being the amount of one year's land tax payable by the defendant to the plaintiff on January 1, 1900, charged upon two houses in High Street, St. Giles, in the county of Middlesex, to which sum the plaintiff claimed to be entitled as assignee of the benefit arising under the certificate of the contract for the redemption of the land tax dated February 19, 1874.

The defendant gave notice of the special defence that the plaintiff's claim was barred by the Statute of Limitations.

In 1873 the owner in fee of the two houses in question, 61 and 61A, High Street, St. Giles, granted a lease of them to one Purkis for a term of forty-two years, and the lease contained a covenant by the lessee to pay (inter alia) all land tax charged upon the property during the term. Purkis was also lessee for years of No. 62, High Street, the three houses being then occupied together as a public-house. In 1874 Purkis redeemed the land tax on all the property under the powers given by the Land Tax Redemption Act, 1802, and in 1879 he handed the certificate of the contract of redemption to the plaintiff with the intention of transferring the benefit thereof to him. A formal assignment of the benefit of the contract had subsequently been made by Purkis to the plaintiff. By various mesne assignments the lease of the houses 61 and 61A, High Street became in 1885 vested in the defendant, who by mistake paid the land tax to the Commissioners thenceforth till the year 1900. The plaintiff, on receiving the certificate of redemption in 1879, put it away with his title-deeds, and forgot all about it till the year 1900. The lease of No. 62, High Street was, when the action was brought, vested in the plaintiff.

(1) [1901] 2 K. B. 7.

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The annual sum payable in respect of the redeemed land tax on the houses 61 and 61A, High Street was 9*l.*, and the action was brought to recover one such annual payment due on January 1, 1900. (1) The county court judge gave judgment for the defendant, on the ground that the plaintiff's claim was barred by lapse of time.

The Divisional Court held that the yearly sum payable under s. 123 of the Land Tax Redemption Act, 1802, by way of interest on the amount paid as the consideration for the redemption of land tax is a "rent" within the meaning of the Real Property Limitation Act, 1874, s. 1, and therefore affirmed the judgment of the county court judge.

Martelli, for the plaintiff. There is no Statute of Limitations applicable to this claim. The case is not within s. 8 of the Real Property Limitation Act, 1874, because there is no power to enforce payment of the principal of the moneys paid as the consideration for the redemption of land tax by any form of action. The nature of the charge given by s. 123 of the Land Tax Redemption Act, 1802, was discussed in *Cousins* v. *Harris* (2), where it was held that there was no right of action in respect of the principal, though the owner of the charge may

(1) By the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 123, it is provided that "where any person or persons, having any estate or interest (other than an estate of inheritance) in any manors, messuages, lands, tenements, or hereditaments, shall redeem the land tax charged thereon by or out of his, her, or their own absolute property, such manors, messuages, lands, tenements, or hereditaments shall be and become chargeable for the benefit of such person or persons, his, her, or their executors, administrators, or assigns . . . . with the amount of the moneys paid as the consideration for the redemption of such land tax . . . . and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land tax redeemed."

Sect. 125: "In all cases where any . . . . person or persons redeeming any land tax shall by virtue of this Act be entitled to have and receive out of any manors, messuages, lands, tenements, or hereditaments, any yearly sums of money by way of interest, or by way of rent or rent-charge, equal in amount to the land tax redeemed, such yearly sum shall be payable on the same days as such land tax was payable at the time of the redemption thereof, ... and shall be recoverable by action, suit, distress, or any other means whereby rents reserved on leases are recoverable by law."

(2) (1848) 12 Q. B. 726.

be compelled to receive it at any time, if the owner of the land wishes to redeem.

[ROMER L.J. It may be that there is no personal liability imposed on the owner of the land to pay the principal of the moneys paid for redemption of land tax; but why should there not be an action in equity to raise the amount of the charge out of the land in the usual way?]

The Land Tax Redemption Act, 1802, gives by s. 125 special remedies for enforcing payment of the annual sum, and does not appear to contemplate the raising of the principal by sale of the land. It is submitted that the express provision of these remedies must be taken to exclude any other. It might be a great hardship on the owner of land, who is no party to the redemption of the land tax, and cannot prevent it, to be compelled at any moment to redeem the charge for the principal of the moneys paid for the redemption, or submit to a sale of part of his land. There is no precedent for such an action as is suggested. Secondly, the annual sum payable under s. 123 of the Land Tax Redemption Act, 1802, is not a "rent" within the meaning of s. 1 of the Real Property Limitation Act, 1874. By s. 125 of the Land Tax Redemption Act, 1802, it is put on the same footing as rent reserved on a lease. It was held in *Grant* v. *Ellis* (1) that the word "rent," as used in the corresponding section of 3 & 4 Will. 4, c. 27, did not apply to rent service, but only to rents which are in the nature of realty, such as rent-charges. It was said in that case that the word "recover" in the section was equivalent to "obtain possession or seisin of." The annual sum mentioned in the Land Tax Redemption Act, 1802, s. 123, is not in the nature of realty. By s. 1 of 3 & 4 Will. 4, c. 27, the word "rent" is to extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, except where the nature of the provision or the context of the Act excludes such a construction. As interpreted in *Grant* v. *Ellis* (1), the context of the Act in s. 1 excludes from the definition such a periodical sum as that here in question.

(1) (1841) 9 M. & W. 113.

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Warrington, K.C., and *Duka*, for the defendant, were not called upon to argue.

COLLINS M.R. This is an action brought by the assignee of a person who redeemed the land tax upon certain premises, of which he was lessee, to recover the amount of one year's land tax by way of interest on the sum paid for redemption; and the question is whether the plaintiff's claim has been barred by any Statute of Limitations. The redemption of the land tax took place in 1874. The assignment to the plaintiff of the benefit of the contract for redemption was in 1879, and from that time down to the claim in the present action no payment has ever been demanded or received in respect of the amount paid for redemption of the land tax. The rights of a person, other than the owner of an estate of inheritance, on redeeming the land tax are defined by the Land Tax Redemption Act, 1802, ss. 123 and 125. Sect. 123 provides that, where any person or persons having any estate or interest, other than an estate of inheritance, in any manors, messuages, lands, tenements, or hereditaments, shall redeem the land tax charged thereon by or out of his, her, or their own absolute property, such manors, messuages, lands, tenements, or hereditaments shall be and become chargeable for the benefit of such person or persons with the amount of the moneys paid as the consideration for the redemption of such land tax, and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land tax redeemed. By s. 125 it is provided that, in all cases where any person or persons redeeming any land tax shall by virtue of the Act be entitled to have and receive out of any manors, messuages, lands, tenements, or hereditaments, any yearly sums of money by way of interest, or by way of rent, or rent-charge, equal in amount to the land tax redeemed, such yearly sum shall be payable on the same days as such land tax was payable at the time of the redemption thereof, and shall be recoverable by action, suit, distress, or any other means whereby rents reserved on leases are recoverable by law. The plaintiff's contention is that no Statute of Limitations applies. It is contended for the

defendant, on the other hand, that the claim for such a yearly sum in this case is barred by the Statute of Limitations, the enactment applicable being either s. 1, or s. 8, of the Real Property Limitation Act, 1874. Sect. 1 of that Act provides that "after the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same." There is no doubt that, if this claim is in respect of a "rent" within the meaning of that section, it is barred. It seems to me that, for the reasons which are given by Channell J. in the Court below, which I need not repeat, this yearly sum of money is a rent within the meaning of the section as explained by the decisions. The learned judge points out that by s. 1 of 3 & 4 Will. 4, c. 27, which is to be read together with the Real Property Limitation Act, 1874, the word "rent" is made to extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land. The word "rent" in that section has, no doubt, been so interpreted as to exclude rent payable under a lease for years. But I think that, for the reasons given by Channell J., that limitation of the meaning of the term "rent," as used in s. 1, does not apply to the annual sum payable in respect of redeemed land tax, which is not in the nature of rent service, but is an annual sum charged on the land.

But, assuming that this view is wrong, and that this annual sum is not "rent" within the meaning of s. 1, then I think that the case falls within s. 8 of the Act of 1874. That section provides that "no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable

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Collins M.R.

out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action, or suit, or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." The question is whether the moneys paid for the redemption of the land tax under the Land Tax Redemption Act, 1802, s. 123, are charged upon or payable out of land within the meaning of the section; for, if they are, the plaintiff's claim is clearly barred. The plaintiff's counsel admits that there is a charge, but he says that the case is not within the section, because no action could be brought to enforce the charge, for which proposition he cites *Cousins* v. *Harris*. (1) When that case is examined, it appears not to deal with the equitable aspect of such a charge, or the rights of the person entitled to it in equity. The particular point here raised did not arise for discussion in that case, and it is not a decision that a suit in equity could not be brought to enforce such a charge. In the absence of any other authority, it appears to me that the charge on the premises by virtue of the statute must be a charge which is capable of being enforced by the usual procedure in equity like any other charge. Therefore, if I were wrong in saying that this annual sum is a rent within s. 1 of the Real Property Limitation Act, 1874, it would, I think, come within s. 8, and consequently in either point of view the claim is barred. For these reasons I think the appeal must be dismissed.

ROMER L.J. I am of the same opinion. If a person is the owner of an equitable charge on land of an ordinary kind, then, although there may be no personal liability on the part of the

(1) 12 Q. B. 726.

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owner of the land to pay the sum charged, the owner of the charge has a right to bring an action in a Court of Equity to have the charge realized by sale of the land. It is settled law that such a charge comes within s. 8 of the Real Property Limitation Act, 1874, and the period of limitation begins to run under that section from the time when a present right to receive the money charged accrued to some person capable of giving a discharge for the same, unless there has been a payment of part of the principal or of interest or an acknowledgment, in which case it runs from the date of such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one. Turning to the present case, we find that under the Land Tax Redemption Act, 1802, s. 123, a person having an estate, other than one of inheritance, in land charged with land tax may redeem the land tax, and on such redemption the land is to be chargeable for his benefit with the amount of the moneys paid for redemption, and an annual sum of money by way of interest equal in amount to the land tax redeemed. Therefore by the express terms of the Act the person so redeeming the land tax is to have a charge for principal as well as interest. Then is there anything in the statute to take away the rights which would ordinarily follow from a charge of a principal sum and interest thereon on land? I can see nothing. It is true that there may be no personal remedy against the owner of the land for the amount of the charge. That I think was what in substance was held in *Cousins* v. *Harris* (1); but it was also held in that case that the owner of the land would have a right to redeem the charge. I think that it follows that there must be a reciprocal right on the part of the owner of the charge to enforce it in the ordinary way, and, therefore, I think that this case is within s. 8 of the Real Property Limitation Act, 1874, and the plaintiff's claim is consequently barred. But, supposing that I were wrong as to that, and that under the 123rd section of the Land Tax Redemption Act, 1802, there were not a charge in respect of principal and interest, then I think the case must be regarded

(1) 12 Q. B. 726.

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as being within s. 1 of the Real Property Limitation Act, 1874, so that in either view of the case the plaintiff's claim is barred.

MATHEW L.J. I am of the same opinion. The Land Tax Redemption Act, 1802, s. 123, says in terms that there shall be a charge on the land in respect of the moneys paid for redemption of the land tax as well as interest, and I think that means a charge in the usual sense of the term. But, if that be not so, then I think that the yearly sum payable is a "rent" within the meaning of s. 1 of the Real Property Limitation Act, 1874. So that either way the appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *T. Parsons.*

Solicitors for defendant: *Bayley, Adams, Hawker & Noble.*

E. L.

C. A. 1902 *March 5.*

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL ON THE RELATION OF THE BROMLEY RURAL DISTRICT COUNCIL *v.* COPELAND.

Highway—Drain—Water flowing from Highway—Discharge on Land of Adjoining Owner—Absence of Defined Channel at Outlet of Drain—Claim of Right—Presumption of Legal Origin—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 67.

The highway authority of a rural district had, for a time beyond living memory, maintained a pipe running through a bank which divided the highway from the defendant's land adjoining, and had discharged, through the pipe and on to the defendant's land, water which collected on the highway. There was no defined channel on the defendant's land into which the water so discharged could flow. The defendant having stopped up the pipe, an injunction was claimed to restrain him from continuing the obstruction. On appeal from the refusal of the injunction:—

Held, that the fact that the pipe was not connected with a defined channel into which the water conveyed by it could flow did not prevent its being a drain within the meaning of s. 67 of the Highway Act, 1835; and that, in view of the length of time during which the drain had been

used, a legal origin ought to be presumed for the right claimed of passing water through the drain on to the defendant's land.

Judgment of Lord Alverstone C.J., [1901] 2 K. B. 101, reversed.

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APPEAL from a judgment of Lord Alverstone C.J., reported [1901] 2 K. B. 101.

The Bromley Rural District Council are the highway authority for the parish of West Wickham, in the county of Kent, and the defendant is the owner of certain land in the parish adjoining a highway within the jurisdiction of the council, and separated from the highway by a bank. This road, at the point where it adjoins the defendant's land, has a rising gradient in each direction, and the rain and storm water falling on the road naturally flowed down from each direction to the point opposite the defendant's land and there fell into two catch-pits, one on each side of the road. These two catch-pits were connected by means of a pipe under the road, and the whole of the water ultimately found its way into the catch-pit next the defendant's land, which was at a lower level than the other. There was a pipe through the bank, by which the overflow from the catch-pit was discharged on to the defendant's land, from which point the water flowed away over the surface of the land, and not in any defined channel. The evidence shewed that in 1868 the then existing catch-pits were repaired, and the pipes under the road and through the bank were replaced by those now in position. The defendant, who is a builder, had bought the land in question about two years before action brought, and, having erected some houses and laid out gardens upon it, he blocked up the end of the pipe so as to prevent the continuance of the flow of the water over his land. Thereupon an injunction was claimed to restrain the defendant from maintaining the obstruction.

Lord Alverstone C.J. gave judgment for the defendant. (1)

The district council appealed.

Bray, K.C., and *Clarke Williams*, for the council. By s. 67 of the Highway Act, 1835, the surveyor of highways, who in the present case is represented by the district council, has

(1) [1901] 2 K. B. 101.

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"power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, ... in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby." The pipe made through the defendant's bank is a drain through land adjoining the highway within the meaning of the section, and though the pipe is a short one it is part of a larger system. It cannot make any difference that there is no ditch or channel to receive the water on the other side of the bank: that fact could only affect the amount of the compensation payable under the section. From the long enjoyment it is to be inferred that the pipe was either made by the owner of the land and dedicated to its present use, or made by agreement between him and the local authority, or made under s. 67 on payment of compensation. In either of these ways a legal origin can be arrived at for the right claimed. *Croft* v. *Rickmansworth Highway Board* (1) has no application to the present case.

G. B. Rashleigh, for the defendant. The pipe is not a drain within the meaning of s. 67 of the Highway Act, 1835; therefore that section does not apply. A pipe used to carry off surface water cannot be regarded as a drain unless it discharges into a sewer or other defined outfall channel. In *Croft* v. *Rickmansworth Highway Board* (1), where waste water flowed through pipes into a dumb-well from whence it percolated into the soil, it was held that the defendants were not authorized under that section to clean out the dumb-well and the drain-pipes connected with it as part of their drainage system. The discharge into the dumb-well in that case corresponds with the discharge on to the surface of the defendant's land in the present. The effect of that decision is that the highway board were not entitled to make a swamp on the land of an adjoining owner, and that is what the district council have done in this case.

COLLINS M.R. In this case there is a complaint by the Attorney-General, at the instance of the local authority of

(1) (1888) 39 Ch. D. 272.

Bromley, that the defendant has stopped up a drain which carried away the water that came on to the highway. It has been proved that this means of carrying off the water, which for present purposes I will call a drain, has existed as far back as living memory will go and so before this local authority came into existence, and by modern legislation the local authority has taken over the powers and duties of the surveyor of highways. Where there has been well-established user, as in this case, extending over a long series of years, it is the duty of the Court, if possible, to find a legal origin to explain the existing facts. It was said, however, that, having regard to the particular character of the structure, it does not come within any of the words of the statute relied on by the appellants, and the Lord Chief Justice so held, on the ground that it had no proper outlet. Looking at the character of the place, we find that the road that passes the spot rises on either side, and that the land on the side away from the defendant's land slopes to the road. Under these circumstances, water would run down to this spot and would be impounded on the surface of the road unless it is carried away by some means or other. There are catch-pits on either side of the road with a connection between them by which the water from the other side flows into the catch-pit on the east side, and the whole escapes by a pipe six feet long, which carries it through the hedge and discharges it on the defendant's land. That mode of removing the water from the road, or some method for which it was substituted, has been in existence, as I have already said, for many years. It is compatible with certain evidence that was given in the case that there had at one time been a ditch on the defendant's land which carried away the water from the point at which it entered the land. Upon this state of facts it seems to me that this convenience for carrying away the water was a drain within the meaning of the section; and, moreover, that a legal origin was possible and ought to be presumed for the right which is claimed by the local authority to use this drain to carry away the water from the road. I think, therefore, that the decision of the Lord Chief Justice should be reversed.

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I ought to add that the case of *Croft* v. *Rickmansworth Highway Board* (1) does not touch this case, because the decision is confined to what is called a dumb-well, and does not deal with any question as to the pipe which conveyed water to the dumb-well.

ROMER L.J. I am of the same opinion. There seem to me to be in this case three alternatives. There might have been on the defendant's land a natural drain to carry away the water from the road at the point where it would flow on to the defendant's land. In that case the pipe would be put down at that point to assist the natural flow of the water, and the defendant would not be entitled to stop it. Another alternative is that the acts done by the surveyor of highways in 1868 were done in pursuance of some existing legal right independently of the statute. If, however, there was no such right outside the statute, the question arises, as a third alternative, whether a legal origin should be assumed for the right now claimed. To my mind, the authority for the time being could have executed this work, short as the distance may be, under the powers conferred by the Highway Act, 1835; and, after the lapse of so long a time as has elapsed since the work was done, it ought to be assumed that it was done under the authority of the Act, either with the consent of the owner of the land or upon payment of compensation to him. It is said that this should not be done because this pipe or drain has no proper outlet. I am not sure that I understand what is meant by a proper outlet; but there is the fact of this lapse of time, and that, at all events since 1868, the water has been discharged without challenge by means of this pipe at this spot. Who is to judge whether, when the work was first done, there was not a proper outlet? In my opinion, the defendant, after this lapse of time, cannot be heard to say that there was no proper outlet when the drain was made.

I think that the right to have this drain on the land is established, and that the defendant had no right to stop it up. I agree, therefore, that the appeal should be allowed.

(1) 39 Ch. D. 272.

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MATHEW L.J. It is clear that for a long time there has been some provision for carrying off the surface water at this point of the road. Something was in existence for some period down to the year 1868, and at that time the works that now exist were made. By s. 67 of the Highway Act, 1835, the surveyor was given certain powers which, so far as is material to this case, included the power to make all such drains as he should deem necessary, in and through any lands or grounds adjoining or lying near to any highway, upon paying compensation. What appears to have been done in this case is within the language and could have been done under the powers conferred by the Act. Whether compensation was ever asked for or made under the terms of the Act does not appear; but the right to compensation, if none was paid, may have been waived. The right to have a drain at this spot has been claimed and acquiesced in for a long period of time, and, under these circumstances, we are bound to assume that it had a legal origin. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *May, Sykes & Co.*
Solicitor for defendant: *A. Pearce.*

A. M.

1902
March 5, 6.

BROWNE *v.* BRANDT.

Innkeeper—Obligation to lodge Traveller—Shelter and Accommodation for the Night—Demand of Traveller to pass Night in Public Room of Inn when Bedrooms full.

If all the bedrooms of an inn be full, the innkeeper is under no obligation at common law to provide a traveller with shelter and accommodation for the night, although the coffee-room be unoccupied and the traveller demands to be allowed to pass the night there.

APPEAL from a decision of the judge of the county court of Surrey, holden at Redhill.

The plaintiff's claim was for damages sustained by reason of the defendant, who was the landlord of an inn called The Chequers at Horley, having refused to give the plaintiff shelter for the night at that inn.

The following material facts appeared from the county court judge's notes and the defendant's answers to interrogatories.

The plaintiff, in April, 1901, was travelling on a motor-car from Crawley to London. The car broke down on the way. The plaintiff walked to The Chequers, where he arrived a little before two o'clock in the morning, roused the defendant, and demanded a bed or beds for himself and a friend who was travelling with him. The defendant refused, saying that he was full. The plaintiff subsequently demanded refreshment, and after some discussion he and his friend were admitted into the inn and refreshment was supplied to them. Whilst in the inn the plaintiff again asked for a bed, and the defendant again refused, saying he was full. The plaintiff then intimated that he and his friend would be satisfied if they were allowed to pass the night in the coffee-room. The defendant refused to allow this, saying that he never allowed any one to sit up all night in the coffee-room. The plaintiff and his friend then left. They could not get accommodation at another inn, and ultimately the plaintiff hired a brougham to take them back to Crawley. There were six bedrooms at the inn, and on the night in question three of them were occupied by guests, and three by the defendant and his family and servants. The

coffee-room and a public sitting-room were not used or occupied on that night.

The county court judge found as facts that the defendant's house was full as regarded proper sleeping accommodation; that there was no empty bedroom; that there were, however, at least two rooms available for the shelter and accommodation of the plaintiff and his friend, and that that accommodation was refused.

He came to the conclusion that the defendant's house was full when the plaintiff applied for beds, and that the defendant was not bound to give the plaintiff accommodation for the night. He therefore gave judgment for the defendant. In case his view should be held to be wrong, he assessed the plaintiff's damages at five guineas.

The plaintiff appealed.

Thornton Lawes, for the plaintiff. The defendant was legally bound to afford the plaintiff shelter for the night. The obligation at common law of an innkeeper to give shelter to travellers has been established from time immemorial. He is bound to give such accommodation as he has. He can only refuse the accommodation on the ground either that his house is full, or that the traveller who seeks admission is not a proper person to be admitted. Here the house was not full. The coffee-room and sitting-room were unoccupied, and if the plaintiff was content with that accommodation the defendant could not refuse it. It is no answer to say that it was unreasonable for the plaintiff to wish to sit up all night in the coffee-room, and the county court judge has misdirected himself if he took that question into consideration in deciding the case. The innkeeper's obligation to afford shelter arises whether the traveller comes by day or by night. The Licensing Acts do not affect the question. The nature of the obligation appears from Roll. Abr., F. 3, pl. 1; Hawkins' P. C., 714; *Rex* v. *Ivens* (1), and *Fell* v. *Knight*. (2)

English Harrison, K.C., and *R. Burleigh Muir*, for the defendant, were not heard.

(1) (1835) 7 C. & P. 213; 48 R. R. 780.

(2) (1841) 8 M. & W. 269.

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LORD ALVERSTONE C.J. The plaintiff in this case contends that the defendant has broken his common law duty as an innkeeper to provide accommodation for travellers, and that this action can be maintained if the defendant had a room at the inn in which the plaintiff could have passed the night. The county court judge has found that the defendant's house was full as regarded proper sleeping accommodation; that there was no empty bedroom; that there were two rooms available for the accommodation of the plaintiff, and that that accommodation was refused. I do not think the question whether the plaintiff demanded to take the one sitting-room was submitted to the county court judge, but I do not wish to decide this case on narrow grounds; we must assume that there was some place in the house where the defendant might have permitted the plaintiff to stay for the night. I think that we should be straining the common law liability of an innkeeper if we were to hold that the plaintiff has a good cause of action. The true view is, in my opinion, that an innkeeper may not pick and choose his guests; he must give the accommodation he has to persons who come to the inn as travellers for rest and refreshment. I cannot think that the authorities to which we have been referred shew that where an innkeeper provides a certain number of bedrooms and sitting-rooms for the accommodation of guests he is under a legal obligation to receive and shelter as many people as can be put into the rooms without overcrowding. I think a person who comes to the inn has no legal right to demand to pass the night in a public sitting-room if the bedrooms are all full, and I think that the landlord has no obligation to receive him. The landlord must act reasonably; he must not captiously or unreasonably refuse to receive persons when he has proper accommodation for them. Here the county court judge has found, in effect, that the defendant did act reasonably. For these reasons I am of opinion that the appeal must fail.

DARLING J. I am of the same opinion. No doubt an innkeeper is bound to provide accommodation for travellers, but he is not bound to do so at all risks and all costs. He is only

bound to provide accommodation so long as his house is not full; when it is full he has no duty in that respect. The question then arises, when an innkeeper's house may properly be said to be full. I do not think that the old cases can help one very much, because in olden times people were in the habit of sleeping many in one room, and several in one bed. People who were absolutely unknown to each other would sleep in the same room, as is done in common lodging-houses at the present time. Therefore, if we got a definition of "full" in one of the old cases, I should not be surprised to find that what was called "full" then we should now call "indecent overcrowding." It is the habit now of people to occupy separate bedrooms, and, having regard to the ordinary way of living at the present time, I think an inn may be said to be full for the purpose of affording accommodation for the night if all the bedrooms are occupied. There might have been a difficulty here if the plaintiff had said, "I will take your sitting-room. I do not want to go to bed. I will sit up all night." But that difficulty does not arise on the facts of this case. The county court judge has found that the house was full having regard to modern ways of living. He referred to Chaucer and the Canterbury pilgrims. One need only look at the "Sentimental Journey" to see how people's habits have altered since the time of Laurence Sterne. I am of opinion that the county court judge's decision was right.

CHANNELL J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *George Terrell, Terrell & Varley.*
Solicitors for defendant: *Morrisons & Nightingale.*

W. A.

C. A.
1902
March 12.

[IN THE COURT OF APPEAL.]

FOULGER *v.* ARDING.

Landlord and Tenant — Lease—Covenant by Lessee to pay and discharge "Impositions charged or imposed in respect of the Premises"—Order by Sanitary Authority on Lessor to do Structural Works.

A lease for years contained a covenant by the lessee to "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no repairing covenant in the lease. Notice was given to the lessor by the sanitary authority of the district under the Public Health (London) Act, 1891, to abate a nuisance caused by a foul and offensive privy on the premises, by removing the privy and constructing a water-closet in accordance with the by-laws of the London County Council. The lessor thereupon did the work required by the notice, and subsequently sued the lessee to recover the expense incurred by him in so doing:—

Held (reversing the decision of a Divisional Court), that this expense was covered by the words "impositions charged or imposed upon or in respect of the said premises on the landlord tenant or occupier of the same" in the covenant, and therefore that the action was maintainable.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J. and Lawrance J.) allowing an appeal from a county court. (1)

The defendant was tenant to the plaintiff of a dwelling-house in the parish of Streatham under a lease for a term of sixteen years from June 24, 1892. The lease contained a covenant that the tenant would "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord tenant or occupier of the same premises by authority

(1) [1901] 2 K. B. 151.

of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." The lease contained no covenant to repair either by the landlord or the tenant.

In August, 1900, during the continuance of the demise, the plaintiff received from the sanitary authority of the district under the Public Health (London) Act, 1891, s. 4 (1), a notice requiring him, as owner of the demised premises, to abate a nuisance thereon arising from a foul and offensive privy, defective soil-pipe, &c., by removing the privy and constructing a water-closet in accordance with the by-laws of the London County Council. The plaintiff, after communicating with the defendant, who repudiated any liability in the matter, did the work required by the notice at the cost to himself of 35*l*. The defendant having on demand by the plaintiff refused to pay him that sum, an action was brought by the plaintiff in the county court to recover the same from the defendant under the above-mentioned covenant in the lease. The deputy county court judge held that the expenses incurred by the plaintiff came within the terms of the covenant, and gave judgment for the plaintiff for the amount claimed.

The Divisional Court reversed his decision.

R. M. Bray, *K.C.*, and *Clavell Salter*, for the plaintiff. This case is distinguishable from the class of cases of which *Tidswell* v. *Whitworth* (2) is a well-known example, on the ground on which that case was distinguished in *Thompson* v. *Lapworth*. (3) In *Tidswell* v. *Whitworth* (2) there were no words such as "charged or imposed in respect of the premises on the landlord, tenant, or occupier of the same." It is contended that the words "impositions charged or imposed in respect of the premises," taken alone, would cover such a charge as this, but, assuming the contrary, their meaning in the present case is extended by the subsequent words. The decision in *Rawlins* v. *Briggs* (4) appears to have turned on the absence of any such words as "on the tenant or landlord of the demised

(1) The material sections of that Act are set out in the report of the case in the Court below.

(2) (1867) L. R. 2 C. P. 326.

(3) (1868) L. R. 3 C. P. 149.

(4) (1878) 3 C. P. D. 368.

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premises." The contrast in the cases subsequent to *Tidswell* v. *Whitworth* (1) has been between the old class of covenant, the terms of which only appeared to contemplate the ordinary charges, such as rates and taxes, imposed on or in respect of the premises, like the covenant in *Tidswell* v. *Whitworth* (1), and the more modern class of covenant, in which there are words clearly shewing that the tenant is to bear all charges or impositions whatsoever in respect of the premises, upon whomsoever they may be imposed, whether landlord, tenant, or occupier. It is submitted that the covenant in the present case clearly falls within the latter class. Words such as "imposed on the landlord" may not of course be absolutely necessary, in order to throw the burden of a charge like this on the tenant, if there are words in the description of the subject-matters of the covenant sufficiently wide without them, as the word "duties" was held to be in *Farlow* v. *Stephenson*. (2) But it is submitted that the addition of words such as "on the landlord, tenant, or occupier" throws a light on the meaning of the words which precede them, and may extend it. In *Crosse* v. *Raw* (3), where the decision was in favour of the landlord, the covenant contained the words "imposed upon the landlord or tenant in respect thereof." In *Hartley* v. *Hudson* (4) no doubt the expenses in question were charged on the premises themselves, but, as a second ground for deciding in the landlord's favour, Lindley J. relied on the words "charged or assessed upon any person or persons in respect thereof." In *Budd* v. *Marshall* (5) the covenant contained the words "or upon the landlords or tenant in respect thereof," and Baggallay L.J. based his decision in favour of the landlords to a great extent on them. In *Aldridge* v. *Ferne* (6) the covenant contained the words "payable either by the landlord or tenant in respect of the said premises," and, in giving judgment in favour of the landlords, Grove J. relied on those words. It is true that in some of these cases the covenant contained a word such as "outgoings" or "duties," which has been held

(1) L. R. 2 C. P. 326.
(2) [1900] 1 Ch. 128.
(3) (1874) L. R. 9 Ex. 209.
(4) (1879) 4 C. P. D. 367.
(5) (1880) 5 C. P. D. 481.
(6) (1886) 17 Q. B. D. 212.

capable of a wider meaning than words such as "rates, taxes, and assessments," which are applicable to periodically recurrent charges in respect of the premises. But it is submitted that the words "impositions in respect of the premises" in this covenant, by themselves, or, at any rate, as supplemented by the subsequent words "on the landlord, tenant, or occupier" are quite wide enough to cover the expense in question. If, as has been held in several cases, the word "duties" is capable of covering money paid in respect of a duty, the word "impositions" is capable of covering money paid in respect of a duty imposed. [He also cited *Smith* v. *Robinson* (1); *Arding* v. *Economic Printing and Publishing Co.* (2)]

Colam, for the defendant. The presence in the covenant of words indicating persons upon whom the charges were imposed, such as "charged or imposed on the landlord, tenant, or occupier," was not really the material factor in the cases in which the landlord has succeeded: see *Brett* v. *Rogers*. (3) In all of these covenants are included matters which cannot properly be said to be charges on the premises themselves, but which are charges on persons in respect of the premises. The decisions in the cases in which the landlord has succeeded all really turn on some word in the covenant, among the nouns specifying its subject-matter, having a wider meaning than "impositions." That word, especially having regard to its collocation with rates, taxes, and assessments, does not point to a charge like that in question, but rather to some money charge analogous to a tax or rate. In *Tidswell* v. *Whitworth* (4) the words were "taxes, rates, assessments, and impositions whatsoever, which shall become payable in respect of the demised premises." There is no real distinction between "payable in respect of the premises" and "payable by the landlord in respect of the premises." The natural meaning of the former words would be "payable by any person in respect of the demised premises": *Brett* v. *Rogers*. (3) If so, the covenant in the present case is substantially the same as that in *Tidswell* v. *Whitworth*. (4) In *Thompson* v. *Lapworth* (5) the covenant contained the word

(1) [1893] 2 Q. B. 53.
(2) (1898) 79 L. T. 420, 622.
(3) [1897] 1 Q. B. 525, at p. 529.
(4) L. R. 2 C. P. 326.
(5) L. R. 3 C. P. 149.

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"duties," which constituted really the substantial distinction between that case and *Tidswell* v. *Whitworth*. (1) In no case has the word "impositions" been held to cover expenditure of the kind here in question by a landlord. In the cases in which the landlord has succeeded, the judgment has been based upon the presence in the covenant of some word like "duties" or "outgoings," as for instance in *Farlow* v. *Stephenson* (2) and *Crosse* v. *Raw*. (3) In *Brett* v. *Rogers* (4), though the word "impositions" occurred in the covenant, the decision was based not on that word, but on the word "duties." In later cases such as *Farlow* v. *Stephenson* (2) no stress is laid on the presence or absence of such words as "on the landlord or tenant." If those words do not constitute a distinction, this case is undistinguishable from *Rawlins* v. *Briggs*. (5) [He also cited *Allum* v. *Dickinson* (6); *Wilkinson* v. *Collyer* (7); *Hill* v. *Edward* (8); *Badcock* v. *Hunt*. (9)]

Clavell Salter, for the plaintiff, in reply.

COLLINS M.R. The cases on this subject no doubt run very fine, as must often happen where decisions turn on the construction of particular covenants the words of which are not exactly the same. On the whole I have come to the conclusion that this appeal must be allowed. It has often been my fortune, or perhaps misfortune, in the course of my professional experience, to have to go through the series of cases on this subject up to date, but I do not propose to go through them again on the present occasion. It appears to me that a lamentable waste of judicial time and power is often involved in examining decisions with regard to the meaning of words which with one context are capable of one meaning and with another context of another meaning. With regard to the present case, it is obvious, to begin with, that the covenant was framed with the object of throwing on the tenant the burden of obligations some of which, in the absence of such a cove-

(1) L. R. 2 C. P. 326.
(2) [1900] 1 Ch. 128.
(3) L. R. 9 Ex. 209.
(4) [1897] 1 Q. B. 525.
(5) 3 C. P. D. 368.
(6) (1882) 9 Q. B. D. 632.
(7) (1884) 13 Q. B. D. 1.
(8) (1885) 1 Cab. & E. 481.
(9) (1888) 22 Q. B. D. 145.

nant, might fall upon the landlord. The question is whether the burden of the particular obligation, which in this case has been imposed upon the landlord, has by the operation of the covenant been thrown upon the tenant. The obligation in question arose under the Public Health (London) Act, 1891, by reason of the structural condition of the demised premises, which were found by the sanitary authority to be in such a state as to call for the exercise of their powers under s. 4 of the Act. A notice was served on the owner of the premises calling upon him to abate a nuisance caused by a foul and offensive privy on the premises, by removing the privy, and constructing a water-closet in accordance with the by-laws of the London County Council. The plaintiff, without waiting for any further compulsion in the matter, did the work required by the notice himself; and the question is whether, as between him and his tenant, the defendant, the latter is bound under the covenant to recoup him in respect of the expense of carrying out the work. It is not suggested that what the plaintiff did was not done under compulsion, or that, if it be necessary for him to shew that the work was done by him under compulsion, in order to bring himself within the meaning of the words "impositions charged or imposed in respect of the said premises," he is not in an equally good position for so doing as if he had waited for final compulsion in the matter by means of a "nuisance order" under s. 5 of the Public Health (London) Act, 1891. The words of the covenant are as follows. The lessee covenants to "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)."

The decisions on this subject remove one or two difficulties which might arise, if the construction of such a covenant as this were being considered for the first time. It is clear on the

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authorities that, where there is a defect inherent in the structure of the premises at the time of the demise, and which is the subject-matter of an obligation imposed by statute on the landlord, the burden of that obligation may, nevertheless, by a covenant of this kind, be thrown upon the tenant. It is also clear from the authorities that a covenant of this kind may, if it contains appropriate words, be construed as being directed, not only to recurring charges such as rates and taxes, but also to charges in the nature of capital expenditure incurred once for all, such as charges in respect of structural work.

If the matter were unincumbered by authority, and could be looked at with clear eyes, regardless of the labyrinth of cases on the subject, I think that no one could doubt that an obligation, such as that in the present case, imposed upon a landlord in respect of a structural defect, which he was bound by statute to remedy or to pay the cost of remedying, might properly be described as an imposition charged or imposed upon the landlord in respect of the premises. It seems to me that, if the matter were clear of authority, the obligation imposed on the plaintiff in this case would come within the plain meaning of the words of the covenant. The only possible answer appears to me to be that which was indicated by an observation of my brother Romer during the argument. It may be asked, if so wide a sense is to be given to the word "imposition," where is the line to be drawn? If it is to be construed as capable of covering this case, must it not be equally capable of covering such a case as one in which demised premises were built beyond the building line of a street, and there was a consequent obligation on the landlord to pull down part of the premises and rebuild in conformity with the building line? It is said that it could not possibly be contended that such an obligation was within the meaning of the term "imposition" as used in a covenant of this kind. This argument may, as it seems to me, be met by pointing out that underlying the whole matter is the consideration that we are dealing with a contract of demise between landlord and tenant, and the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the

purview of such a contract; and such an extreme case as that of an obligation to pull down and rebuild the premises is so far outside of anything that can possibly be conceived of as being within the contemplation of the parties that it is necessarily excluded from the meaning of words which might otherwise have been wide enough to include it. That this is so seems to me really to follow from some of the decided cases on the subject. It has been held, for instance, that the word "outgoings" will cover such an obligation as that involved in the present case. But the same argument might have been used with regard to that word. The word "outgoings," in its widest sense, might cover more than the parties to such a covenant could possibly have contemplated. But it was not suggested that, because it might cover a wider area, it could not be construed as covering an obligation which the parties might reasonably be supposed to have contemplated. For these reasons I think that, apart from authority, it would be impossible to say that the word "impositions" is not large enough to cover the obligation in the present case. That being so, is there anything in the authorities to debar us from giving its natural meaning to that word? It appears to me that the argument for the defendant based on the authorities really only comes to this, that there is no case in which the word "impositions" alone has been held to cover such an obligation as that here in question. It is urged that, although such an obligation has been made the subject of decision and the burden of it thrown on the tenant under a covenant which contained the word "impositions," the decision was not based on that word, but the Court fastened on some other word as the basis of the judgment. But it is to be observed, on the other hand, that there is no decision to the effect that the word "impositions" cannot cover such an obligation, and it does not follow, because in another case the Court, having a choice of words, fastened on some other word, that, if that other word had not been used in the covenant, the Court would not have fastened on the word "impositions." As I have said, I think that that word is wide enough; and it seems to me also that an obligation of this kind is one of the very things that the

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parties would probably contemplate in entering into this covenant, as being a matter which might ordinarily arise as an incident of the relation between landlord and tenant. It is not an imposition of a class which is so far outside that relation that it could not have been contemplated by the parties.

I will say a few words with regard to the general current of authority in the cases on this subject which have been cited to us by counsel, who began in due course with the case of *Tidswell* v. *Whitworth* (1), and then proceeded to *Thompson* v. *Lapworth* (2), and so on through the later cases. The distinction which appears to have been taken between the covenants in *Tidswell* v. *Whitworth* (1) and *Thompson* v. *Lapworth* (2), and for some time to have been treated as the cardinal distinction in such cases, was that in the first of those cases there was no reference to any persons upon whom the impositions intended to be covered by the covenant were charged or imposed, whereas in the second the covenant spoke of them as imposed "on the tenant or landlord of the premises demised in respect thereof." It appears to me that, in the earlier cases which followed, stress was laid on the presence or absence of words of this kind rather than on the words used in the description of the nature of the obligations included in the covenant, and the presence or absence in that description of particular words such as "duties" or "outgoings." Later on greater emphasis appears to have been laid in the cases on the presence of words like "duties" or "outgoings" in the description of the obligations included in the covenant than on that of words describing the person or persons on whom they were imposed. *Brett* v. *Rogers* (3) may be referred to as one of the latter class of cases, the last of which is *Farlow* v. *Stephenson* (4), where the Court no doubt gave effect to the word "duties" as throwing the obligation on the tenant, though there were no words in the covenant describing the person or persons on whom the duties were imposed. I do not feel quite sure that, at the time when *Tidswell* v. *Whitworth* (1) was decided, a covenant in precisely the same form as that in *Farlow* v.

(1) L. R. 2 C. P. 326.
(2) L. R. 3 C. P. 149.
(3) [1897] 1 Q. B. 525.
(4) [1900] 1 Ch. 128.

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Stephenson (1) would have been treated as throwing the obligation there in question on the tenant. But that does not seem to me material to the present discussion. On the prior authorities down to *Brett* v. *Rogers* (2), it seems to me that the argument of the plaintiff's counsel ought to prevail. It is enough for them to shew that the covenant in this case contains a word apt to describe the particular obligation in question, and to refer to the presence in it of other words, shewing that it cannot be limited to charges on the premises themselves, but extends to charges imposed in respect of them on persons, namely, landlord, tenant, or occupier. I do not propose to go into the authorities in detail. Summarizing what I have said, it appears to me that the words of this covenant are primâ facie wide enough to cover the obligation in question, that it is one of a class which would be within the contemplation of the parties to the covenant, and that there is nothing in the authorities which debars us from giving to the covenant what appears to us to be its proper construction. For these reasons I think the appeal must be allowed.

ROMER L.J. I am of the same opinion. There is one thing of which, after hearing the arguments in this case, I am satisfied, namely, that the authorities on this subject are in a very unsatisfactory condition. Speaking for myself, I am disposed to regret that the line to which the decision in *Tidswell* v. *Whitworth* (3) pointed has not been followed in these cases; but undoubtedly the tendency of subsequent authorities, beginning with *Thompson* v. *Lapworth* (4), has been in the opposite direction, and the general current of decision has been in favour of the landlord, and not in favour of restricting the meaning of such covenants. In particular I am disposed to regret the line of authorities which has given such an extensive meaning to the term "duties" in covenants of this kind; but it is too late, even for this Court, to alter what is now practically settled law on the subject. I take it that, as the authorities now stand, if, in a case like the present

(1) [1900] 1 Ch. 128.
(2) [1897] 1 Q. B. 525.
(3) L. R. 2 C. P. 326.
(4) L. R. 3 C. P. 149.

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the word "duties" were included in the covenant, undoubtedly the tenant would be bound to recoup the landlord for expenditure which he might have incurred such as that here in question. For that proposition I need only refer to the case of *Farlow* v. *Stephenson*. (1) That being so, can we, or ought we, to draw a distinction between the case of a covenant like this, but containing the word "duties," and the case now before us? It appears to me that it would be a lamentable thing that the result of the authorities should be that, if a covenant of this kind speaks of "duties imposed on the landlord or tenant in respect of the demised premises," such an expense as that here in question must be borne by the tenant, but, if the covenant speaks of "impositions charged or imposed on the landlord or tenant in respect of the demised premises," then the tenant is not liable under it. It seems to me that such a distinction is one which we ought not to draw. The cases shew that a "duty imposed" means a sum of money payable in respect of a duty imposed. What then is an "imposition" within the meaning of this covenant? I should say, apart from authority, that in this covenant it means a sum of money payable by the landlord or tenant in respect of an imposition. A duty imposed appears to me to be an imposition, and I should say that the word "imposition" is, if anything, rather larger than the word "duty." Therefore I do not think that we ought to treat it as bearing a narrower meaning. I agree that it ought not to be treated as covering a matter which would be beyond anything that the parties to the lease could reasonably be supposed to have contemplated, but I cannot say that the expense incurred by the landlord in this case was something which clearly was not intended to be covered by the covenant. What is the liability which was imposed on the landlord, and in respect of which he paid the money now said to be an "imposition" within the meaning of the covenant? It was a liability to construct a water-closet, which arose during the continuance of the term, and which was imposed upon the landlord by reason of statutory power given to the sanitary authority to require the construction of

(1) [1900] 1 Ch. 128.

such a closet. The expenditure in question was therefore in respect of something arising de novo during the demise. It does not appear to me that such a liability is one as to which it could be said that, as between himself and his tenant, the landlord himself was clearly bound to bear it, and which it would be unjust to cast on the tenant by virtue of the covenant. The present is not a case, such as was suggested during the argument, in which any one would say, looking at the nature of the contract between the parties, that the matter was not one which could have been within their contemplation, being altogether outside the scope and purview of that contract. I see nothing in the circumstances of this case which would enable me to say that the nature of the liability in question is obviously such that the parties could not have contemplated it. On the contrary, I think it is just one of those liabilities which probably was contemplated by the contract. The case not being outside the scope of the contract, and being within the natural meaning of its terms, I think that no distinction can be drawn between it and the case of a covenant in which the word "duties" occurs, and therefore that the decision of the Court below was wrong and should be reversed.

MATHEW L.J. I am of the same opinion. The two cases of *Tidswell* v. *Whitworth* (1) and *Thompson* v. *Lapworth* (2), which were cited in argument, indicate the course of two streams of authorities on this subject. In the first of those cases there was a covenant to pay the ordinary rates and charges in respect of premises which are payable by the tenant, and it was held that the covenant did not apply to money which became payable by the landlord in respect of the premises under a local Act of Parliament by reason of a breach by him of a duty imposed upon him by the Act. In many cases subsequent to that decision, of which *Thompson* v. *Lapworth* (2) was the first, a covenant in wider terms has been held to cover a charge in respect of the premises which, like that in the present case, might be described as a capital charge. Where landlords are in a position, as is not infrequently the

(1) L. R. 2 C. P. 326. (2) L. R. 3 C. P. 149.

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case, to dictate terms to a tenant, they would naturally be anxious to get rid of the liability to such charges as these, and the more so that the amount of them would be uncertain. So, in a number of cases, which have been cited by the counsel for the plaintiff, the landlord clearly intended, by virtue of such a covenant as that in the present case, to throw upon the tenant charges which otherwise would have fallen on himself, and was successful in doing so. The words in such covenants have not always been exactly the same, but substantially they have indicated the same object. In the present case it is to be observed that the covenant speaks of main drainage rates, which are charges analogous to the charge here in question, being in respect of what is in the nature of capital expenditure. In cases like the present the charge is not imposed on the premises themselves, but imposed on the landlord personally in respect of them; and, therefore, if it were necessary, for the purpose of transferring the burden to the tenant, to shew that there was a charge imposed on the premises, the tenant would escape. So, we find in these cases introduced into the covenant such words as "charged or imposed on the landlord, tenant, or occupier of the premises," which are the words used in the present case. In my opinion the expense incurred by the landlord in this case comes within the plain meaning of the words of the covenant as being "an imposition charged or imposed on the landlord in respect of the demised premises." At the time when this covenant was entered into the possibility of such a charge as this becoming payable in respect of the premises would, I think, clearly be within the contemplation of the parties to the lease, and therefore it cannot be said to be a matter outside the scope of such a covenant as we have to construe. For these reasons I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Foulger, Robinson & Miller.*
Solicitor for defendant: *G. Aplin Nichols.*

E. L.

Explained and distinguished. Re Fox. [1948] 1 All E.R. 849.

Considered. *In re* Fox. [1948] 1 Ch. 407

In re WEIBKING.
Ex parte WARD.

1902
Jan. 27;
Feb. 18.

Bankruptcy—Building Agreement—Chattels "to be deemed annexed to the Freehold"—Mortgage of Building Agreement—Mortgagee empowered to take Possession if Builder should "become Bankrupt"—Bankruptcy of Builder—Reputed Ownership of Chattels—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), s. 44.

A building agreement provided that all the loose materials and plant brought upon the land should "be deemed to be annexed to the freehold." The builder by deed assigned "all his interest under the building agreement" to H. to secure advances. This deed provided that, if the builder should "become bankrupt," H. might take possession of the land comprised in the building agreement and complete any unfinished houses. A receiving order was afterwards made against the builder, and adjudication followed. H. took possession under the mortgage when the receiving order was made, on the ground that the builder had "become bankrupt," and completed some unfinished houses, using the loose plant and materials then on the premises:—

Held, that "become bankrupt" meant "be adjudicated a bankrupt," and therefore that, the builder not being in default under the mortgage when the receiving order was made, H. was not then entitled to take possession:

Held, also, that the loose plant and materials on the land at the date of the receiving order were in the reputed ownership of the builder with the consent of the true owner, the freeholder, and passed to the trustee in bankruptcy.

The principle of *In re Ginger*, [1897] 2 Q. B. 461, applied.

THIS was an application by the trustee in bankruptcy, and raised the question whether certain chattels were in the reputed ownership of the bankrupt at the commencement of his bankruptcy, under these circumstances.

On July 22, 1901, one Weibking, trading as a builder under the style of Weibking & Sons, entered into a building agreement with the freeholder of certain plots of land to erect fifty houses thereon. This agreement provided (amongst other things) as follows:—

Clause 16. That Weibking was to be deemed tenant at will to the freeholder of the land until the leases therein agreed to

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be granted on completion of the houses should have been granted.

Clause 17. That all builder's erections, building materials, and plant on the said land could be taken possession of by the lessor in the event of the tenant making default in erecting any of the houses, &c.; and thereupon the agreement was to cease, but without prejudice to the freeholder's right of action for rent, &c., or in respect of any breach by the tenant.

Clause 18. That all materials and plant brought upon the said premises were to be deemed to be annexed to the freehold, the tenant, however, being given the option of purchasing the freehold.

By deed dated August 2, and stated to be supplemental to the building agreement, Weibking assigned "the building agreement and all his interest thereunder" to Ann Hartley, as security for repayment to her with interest of moneys then advanced and to be advanced by her to him. This deed provided that if Weibking should make default in payment of any principal or interest, or should not duly observe and fulfil the terms and conditions of the building agreement (which events did not happen), or should "become bankrupt," then and in any such case Ann Hartley might at any time thereafter enter into and upon and take possession of the land and buildings comprised in the building agreement, and complete any houses or buildings which might be unfinished in such manner as she should think fit, subject to the provisions of the building agreement.

On August 17 a receiving order was made against Weibking on his own petition presented that day, and on August 30 he was adjudicated bankrupt, and one Ward became the trustee in bankruptcy.

On August 17, after the receiving order was made, Ann Hartley, with the consent of the freeholder and on the ground that Weibking had "become bankrupt," entered and took possession of the land comprised in the building agreement, and afterwards completed some of the unfinished houses, using for that purpose loose plant and materials to the value of about 900*l.*, which were on the premises at the date of the receiving

order. Subsequently the trustee in bankruptcy gave notice to disclaim the building agreement, and now claimed, as against Ann Hartley, a declaration that she was not entitled to the loose plant and materials which at the date of the receiving order were on the premises; and payment of the value thereof.

Reed, K.C., Muir Mackenzie, and *A. A. Hudson,* for the trustee in bankruptcy. The trustee's title relates back to the act of bankruptcy committed on August 17, and the receiving order, being a judicial act, dates back when made to the commencement of that day. It is immaterial, therefore, whether the possession taken on that day by the mortgagee was taken before or after the receiving order was made. At that date the bankrupt was not in default either under the building agreement or the mortgage. The words "become bankrupt" in a statute mean an act of bankruptcy followed by adjudication; but in a commercial document like this building agreement such words should be construed strictly and mean, it is submitted, being made a bankrupt. There is no decision on the point. Even if the mortgagee entered rightly under her mortgage, still she had no title to these chattels. She had no charge upon them. Under the building agreement the freeholder had a legal right to them: *Reeves* v. *Barlow* (1); and although as between him and the builder they were to be deemed the property of the freeholder, that did not operate to vest them for all purposes in the freeholder. They were goods which, at the commencement of the bankruptcy, were, so far as the outside world was concerned, in the possession of the bankrupt in his trade or business with the consent of the true owner, the freeholder, and vested in the trustee by virtue of s. 44 of the Act. The mortgagee has taken possession of them and built them into the houses. She had no right to do that, and the trustee is entitled to the value of them.

Warmington, K.C., and *L. Thomas,* for the mortgagee. All the chattels which were on the premises are not claimed by the mortgagee, but only those which have since been built into the houses. These chattels were not the property of the

(1) (1883) 11 Q. B. D. 610; on appeal (1884) 12 Q. B. D. 436.

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bankrupt at the commencement of his bankruptcy, because under clause 18 of the building agreement they were annexed to the freehold, and the freeholder had the legal right to them: *Reeves* v. *Barlow*. (1) They were not a security for any debt, and therefore not within the Bills of Sale Acts. When the builder committed an act of bankruptcy on August 17 he "became bankrupt," and the mortgagee was entitled, with the consent of the freeholder, to enter and complete the buildings, and to use for that purpose the chattels on the premises, which consent was obtained. The trustee cannot claim these chattels under the order and disposition clause in the absence of the freeholder, through whom the mortgagee claims.

Reed, K.C., in reply. The mortgagee clearly had no title to these chattels. If necessary, the freeholder can be brought before the Court.

WRIGHT J. This is a most embarrassing case. It seems to me neither of the parties here is in a position to make out a sufficient title. As regards the mortgagee, the mortgage gives to her no right to the chattels as such, but it gives to her the right on behalf of the builder to make the same use of them as the bankrupt himself could have made. The mortgagee did nothing but what was right under the circumstances, provided she had a right to enter. It seems to me that no right to enter under the mortgage has arisen, because the only right given to the mortgagee is a right to enter if the builder should "become bankrupt." I think that in a contract those words ought to be construed strictly, being words of forfeiture. One knows of many leases and agreements of various kinds in which words of forfeiture occur, such as "if he shall commit an act of bankruptcy or petition the Court," and so forth—words which are not found here. It seems to me, therefore, that the right to enter had not arisen in this case, and therefore no question arises as to whether the mortgagee became entitled. On the other hand, supposing the words "become bankrupt" are satisfied by an act of bankruptcy,

(1) 11 Q. B. D. 610; on appeal 12 Q. B. D. 436.

then the mortgagee appears to me to be in another difficulty. There being an act of bankruptcy, the trustee's title accrued subject to any charge in favour of the mortgagee. There was not any charge in her favour over these chattels so far as I can see. The mortgagee only had the right to build and receive the leases, as the mortgagor would have done. Therefore it seems to me, as the matter stands at present, the mortgagee has no title. But I do not see how I am to give any relief to the trustee in bankruptcy without the presence of the freeholder. I cannot decide the question of order and disposition as against the freeholder in his absence. The building agreement purports to give to him the title to these chattels. I cannot say that the trustee has it. As between the trustee in bankruptcy and the mortgagee it seems clear enough that there was reputed ownership, because, if the freeholder was the true owner, then at the time of the act of bankruptcy I should hold on the evidence that the chattels were in the apparent possession of the builder, as the owner of them with the consent of the freeholder. I cannot decide that. But I think that the mortgagee has no title to these chattels.

Feb. 18. The motion, having been served on the freeholder, now came on for further hearing.

Reed, K.C., *Muir Mackenzie*, and *A. A. Hudson*, for the trustee, relied on their previous arguments, and cited *In re Ginger*. (1)

Beddall and *S. R. Earle*, for the freeholder. *In re Ginger* (1) does not apply. It was a case under the Bills of Sale Acts. Here the chattels, by virtue of the 18th clause in the building agreement, became annexed to the freehold, and the Bills of Sale Acts do not apply: *Brown* v. *Bateman* (2); *Ex parte Newitt* (3); *Blake* v. *Izard*. (4) The builder can use the chattels for the purposes of the building agreement, but the order and disposition clause does not apply, because the free-

(1) [1897] 2 Q. B. 461.
(2) (1866) L. R. 2 C. P. 272.
(3) (1881) 16 Ch. D. 522.
(4) (1867) 16 W. R. 108.

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WEIBKING, *In re.* WARD, *Ex parte.*

holder is not deemed the true owner until he exercises his right of entry, and the trustee in bankruptcy can only take subject to the rights of the freeholder under the building agreement: *Ex parte Newitt.* (1) As to the possession taken by the mortgagee, the Court will take notice of a fraction of a day in determining as to the date of an act of bankruptcy: *Green* v. *Lawrie* (2); *Ex parte Bignold* (3); Robson on Bankruptcy, 7th ed. pp. 556–7.

Warmington, K.C., and *Lewis Thomas*, for the mortgagee.

WRIGHT J. In my opinion this case is governed by the principle of *In re Ginger.* (4) In the present case the freeholder had a clause in the building agreement which annexed to the freehold unconditionally all materials and plant brought on to the premises. Therefore the freeholder was the true owner of the materials and plant in a general sense. Then by the same instrument which gave him the ownership of the chattels he consented to their remaining in the possession of the builder as if the builder were the true owner. That being so, according to the principle laid down in *In re Ginger* (4), the assent given at the time of making the instrument operates as an assent for the purposes of the doctrine of reputed ownership. That being so, I think the case of the trustee is made out. But of course it does not apply to any plant and materials that had been built into and become part of the houses at the date of the act of bankruptcy. It only applies to the plant and materials which were loose on the premises at that date.

Solicitors for trustee: *Braby & Macdonald.*
Solicitors for mortgagee: *Moodie & Son.*
Solicitors for freeholder: *Croft & Mortimer.*

(1) 16 Ch. D. 522.
(2) (1847) 1 Ex. 335.
(3) (1836) 3 M. & Ayr. 9, at p. 13.
(4) [1897] 2 Q. B. 461.

H. L. F.

In re WALLIS.
Ex parte JENKS.

1902
March 10.

Bankruptcy—Chose in Action—Mortgage—Notice—Priorities.

A trustee in bankruptcy, being under the bankruptcy laws only statutory assignee of the bankrupt's choses in action subject to all equities existing therein at the date of the commencement of the bankruptcy, cannot obtain priority over a good equitable mortgagee thereof for value merely by giving notice before the mortgagee.

THIS was an application that raised the question whether the trustee in bankruptcy was entitled to a policy of assurance free from incumbrances under these circumstances.

In March, 1901, one Wallis deposited a policy of assurance on his own life with his wife as security for advances made by her to him. No notice of this equitable charge was given to the assurance society. On October 11, 1901, a receiving order was made against Wallis on his own petition, and the same day adjudication followed. On October 16 the official receiver gave notice of the receiving order to the assurance society. On October 30 M. Jenks was appointed the trustee in the bankruptcy, and now claimed, as against the wife, to be entitled to the policy as part of the property of the bankrupt, free from incumbrances.

Eve, K.C., and *R. Nevill*, for the trustee. The policy is a chose in action, and under the bankruptcy law a trustee in bankruptcy is a statutory assignee of it, and is in the same position as any other assignee. As between two assignees, the one who first gives notice to the assurance office is entitled to the policy: Williams on Bankruptcy, 7th ed. p. 202; *In re Rabbidge* (1); *Howes* v. *Prudential Assurance Co.* (2); *Re United Kingdom Life Assurance Co.* (3); *Rummens* v. *Hare.* (4)

Reed, K.C., and *F. Mellor*, for the mortgagee. It is not

(1) (1878) 8 Ch. D. 367.
(2) (1883) 49 L. T. (N.S.) 133.
(3) (1838) 16 S. 1277.
(4) (1876) 1 Ex. D. 169.

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disputed that, as between two assignees for value, the one who first gives notice obtains priority. But that is not the case here. The trustee in bankruptcy is in the position of a volunteer. He is only a statutory assignee, and under the bankruptcy laws the property of the bankrupt vests in him subject to all equities existing at the commencement of the bankruptcy. He cannot get priority over a mortgagee for value of a chose in action merely by giving notice: *In re Moore* (1); *Newman* v. *Newman.* (2) The case of *Howes* v. *Prudential Assurance Co.* (3) is not in point. It was a claim between two volunteers.

Eve, K.C., in reply.

WRIGHT J. It is singular that there is no direct authority on this point. It is plain that before the bankruptcy there was a good equitable deposit of this policy for value by the bankrupt with his wife. No doubt the general rule is that, as between several assignees or incumbrancers of a chose in action, the assignee or incumbrancer who first gives notice obtains priority. But the trustee in bankruptcy is not an incumbrancer for value. Under the bankruptcy laws he is a statutory assignee, and this policy vested in him subject to all equities existing at the date of the commencement of the bankruptcy. Therefore the trustee could not, by giving notice to the assurance office, deprive the bankrupt's wife of her rights as an equitable mortgagee of the property. He can only have the policy on payment to the wife of what is properly due to her under her security. This application, therefore, must be dismissed with costs.

Solicitors: *Piesse & Co.; Wood & Wootton.*

(1) (1878) 8 Ch. D. 519. (2) (1885) 28 Ch. D. 674.
(3) 49 L. T. (N.S.) 133.

H. L. F.

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Feb. 27, 28; *March* 10.

Inferior Court—Court of Record of Civil Jurisdiction—Appeal to the King's Bench Division—Right of Appeal—Procedure—Judicature Act, 1884 (47 & 48 *Vict. c.* 61), *s.* 23—*Order* LIX., *rr.* 10–17.

An appeal from any inferior Court of Record of civil jurisdiction, when there is no statute regulating the appeal, can now be brought to the King's Bench Division under Order LIX., rr. 10–17.

RULE NISI for a mandamus to the Master of the Crown Office to enter in the list of appeals from inferior Courts a notice of motion by the plaintiff by way of appeal from the Borough Court of Record at Preston.

In this action in the Court of Pleas for the borough of Preston the jury found a verdict for the defendants, and judgment was entered for them.

The plaintiff gave notice of motion, by way of appeal under Order LIX., r. 10, in the King's Bench Division, asking that the verdict and judgment should be set aside and judgment entered for the plaintiff or a new trial had, upon the ground of misdirection. When the plaintiff proceeded to enter the appeal under Order LIX., r. 11, the officer at the Crown Office refused to enter the appeal, upon the ground that an appeal from this Court could not be brought under Order LIX. Thereupon the plaintiff obtained the rule nisi for a mandamus.

Rowlatt, shewed cause. At common law there was no right of appeal from this inferior Court to the King's Bench Division, and no statute has expressly given a right of appeal. It is contended, however, that as a writ of error lay to the King's Bench Division for misdirection, upon a bill of exceptions, therefore there is now a right of appeal, under the rules relating to appeals from inferior Courts in Order LIX. Admitting that a writ of error did lie from an inferior Court, yet a writ of error was not an "appeal" within the meaning of s. 45 of the Judicature Act, 1873, or s. 23 of the Judicature Act, 1884, and, therefore, those sections do not give a right of appeal to

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the King's Bench Division from this Court. Therefore the proceeding by writ of error remains intact as to these inferior Courts and can be brought as before. It was not intended to substitute an "appeal" for a writ of error in these cases; in proceedings in error an appeal can be carried to the House of Lords, but, if "appeal" is substituted for error, that right would be taken away: *Bank of Ireland* v. *Evans*. (1) The general provisions of the Judicature Acts and Rules do not affect the special conditions applicable to the mode of appealing from particular inferior Courts: *In re West Devon Great Consols Mine* (2); *Morgan* v. *Bowles* (3); *Kirby* v. *North British and Mercantile Insurance Co.* (4) Bills of exceptions and proceedings in error have been abolished so far as the Court of Appeal is concerned; and rule 1 of Order LVIII. of the rules in the schedule to the Judicature Act, 1875, by which bills of exceptions and proceedings in error were abolished, was intended to apply only to the Court of Appeal. The Judicature Acts and Rules gave the appeal to the Court of Appeal; they did not give the appeal to the King's Bench Division from inferior Courts, but only regulated the machinery in those cases in which a right of appeal was given otherwise. In the case of inferior Courts there was no abolition of proceedings in error and of bills of exceptions, or the substitution of new procedure, or any new right of appeal given: *Le Blanch* v. *Reuter's Telegram Co.* (5); *Pryor* v. *City Offices Co.* (6) "Appeals" were introduced by the Common Law Procedure Acts, and there was a well-recognised distinction between "appeals" and proceedings in error, and there could not have been any confusion between them when the Judicature Acts were passed. The provisions of the Judicature Acts as to appeals do not apply to proceedings in error from inferior Courts, and in the case of inferior Courts, from which no special right of appeal to the King's Bench Division has been given, there is no right of appeal to the King's Bench Division, but only a right still to bring error.

(1) (1855) 5 H. L. C. 389.
(2) (1888) 38 Ch. D. 51.
(3) [1894] 1 Q. B. 236.
(4) [1896] 2 Q. B. 99.
(5) (1876) 1 Ex. D. 408.
(6) (1883) 10 Q. B. D. 504.

Danckwerts, K.C., and *Firminger*, in support of the rule. Error at common law lay from any inferior Court of Record of civil jurisdiction to the King's Bench or Common Pleas, though as a rule it was brought to the King's Bench. Then, by statute, bills of exceptions were introduced by which objections taken at the trial could be placed upon the record. Error and bills of exceptions were merely the machinery by which proceedings in inferior Courts were reviewed in the King's Bench. The Judicature Acts of 1873 and 1875 did not provide any machinery for dealing with this subject-matter, but s. 23 of the Judicature Act, 1884, gave power to make rules by which that machinery was provided. There is no technical meaning in the term appeal; error was only a mode of appeal; and Order LIX. has now provided the machinery for bringing appeals to the King's Bench Division which were formerly brought by error. A writ of error was ex debito justitiæ, and the removal of the record into the King's Bench was merely a mode of getting the materials before the Court for the purpose of the appeal: *Reg.* v. *Paty* (1); *Jacques* v. *Caesar.* (2) A bill of exceptions was merely the machinery for getting upon the record, for the purposes of an appeal, points which were taken at the trial, and thereby gave a right of appeal in respect of those matters: *Strother* v. *Hutchinson.* (3) There are instances in the reports of appeals from inferior Courts upon a bill of exceptions: *Thomson* v. *Davenport* (4); *Bruce* v. *Wait.* (5) The provisions of s. 149 et seq. of the Common Law Procedure Act, 1852, as to abolishing writs of error, did not apply to inferior Courts, and up to the passing of the Judicature Acts there was an appeal from inferior Courts by writ of error. The provisions of the Judicature Acts of 1873 and 1875, and of the rules in the schedules to those Acts, shew that error was included in and dealt with as an appeal, which in substance it was: *Darley* v. *Reg.* (6); *Reg.* v. *Kettle* (7); *Eder* v. *Levy.* (8)

(1) (1704) 2 Salk. 503.
(2) (1670) 2 Saund. 100.
(3) (1837) 4 Bing. N. C. 83.
(4) (1829) 9 B. & C. 78; 2 Sm. L. C. (10th ed.) 368; 32 R. R. 578.
(5) (1840) 1 Man. & Gr. 1.
(6) (1845) 12 Cl. & F. 520.
(7) (1886) 17 Q. B. D. 761.
(8) (1887) 19 Q. B. D. 210.

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The provisions of Order LIX., r. 9, that "the following rules of this order shall apply to appeals to the King's Bench Division from county courts and other inferior Courts of Record," must refer to appeals from all these inferior Courts; all the proceedings by writ of error were mere machinery for bringing the appeal, and that machinery has now been altered: the right of appeal remains the same as it was, but the mode of appealing is now regulated by these rules.

Cur. adv. vult.

March 10. The judgment of the Court (Lord Alverstone C.J., Darling and Channell JJ.) was read by

CHANNELL J. In this case a rule nisi was granted, calling on the Master of the Crown Office to shew cause why he should not be directed to enter in the list of appeals from inferior Courts a notice of motion by way of appeal from a case tried in the Borough Court of Record at Preston. The notice of appeal complained of alleged misdirection by the judge of the borough court. The Master of the Crown Office refused to enter the appeal on the ground that no appeal lies from the borough court of Preston. The rule has been argued before us; and in considering whether it should be made absolute, we have to determine whether there is now any such right of appeal, and if so, in what cases. The Court in question is an ancient Court of Record held in the borough under a charter. There is no modern Act of Parliament regulating its procedure and giving an appeal from it, as in the case of the Mayor's Court of London, the Liverpool Court of Passage, and the Salford Hundred Court, and possibly other similar Courts. The report of the case of *Addison* v. *Preston Corporation* (1) may be referred to for statements as to the history and jurisdiction of the Court. It is admitted that, in the absence of a statute giving an appeal from the Court in question to this Court, no appeal would lie, otherwise than by substitution for proceedings in error; but it is contended by Mr. Danckwerts, who supported the rule, that a litigant in the borough court

(1) (1852) 12 C. B. 108.

could formerly have tendered a bill of exceptions to the ruling of the judge in case of an alleged misdirection by him, and then have brought error to the Court of King's Bench (or indeed at his option to the Court of Common Pleas), and that the effect of the Judicature Acts and Rules is that an appeal by notice of motion is now substituted for these proceedings in error. Several of the steps in this argument are clear. It is clear that, before the Judicature Acts, error lay to the King's Bench from all inferior Courts of Record in the kingdom, and also that in all such Courts a bill of exceptions to the ruling of the judge might be tendered as in the superior Courts. A misdirection of the judge might, therefore, if the objection to it was duly taken by a bill of exceptions, be reviewed and set right in the Court of King's Bench by the litigant issuing a writ of error, which he could do as of right. Mr. Danckwerts quoted to us many authorities in support of these propositions, but it is unnecessary to refer to them as the law was well settled, though perhaps not very familiar at the present day. These authorities are, however, useful upon the question which we have to consider as to how far the various steps in these proceedings were mere machinery or were matter of substance. The Common Law Procedure Acts of 1852 and 1854 first made changes in the ancient practice, and these Acts have now to be considered. The Act of 1852 contains a number of sections, beginning with s. 146, as to the forms of proceedings in error. By s. 148, "a writ of error shall not be necessary or used in any cause, and the proceeding to error shall be a step in the cause." This appears not to apply to error from an inferior Court, but only to causes in the superior Courts. The writ of error had been practically the commencement of a new action, and by this enactment error was to be only a step in the cause. This it could not be when the proceedings on which error was brought had been taken in an inferior Court; but it is of no importance in the present case whether, in the period between 1852 and 1875, error from an inferior Court ought to have been commenced by issuing a writ of error, or by filing a memorandum with the master, as was done in the case of proceedings in error from one of the superior Courts. Mr. Danckwerts is

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clearly right in saying that the jurisdiction of the King's Bench to entertain proceedings in error from inferior Courts was part of the original or inherent jurisdiction of the Court to examine and correct all errors in inferior Courts: see Coke's 4th Institute, p. 71; and that the writ of error was not really in the nature of a special commission, under which the judges entertained the matter, as appears to have been sometimes thought. No doubt it was the writ of error which in one sense gave the jurisdiction, but only in the same way that a writ in an ordinary action is required to give jurisdiction. The other provisions of the Act of 1852 require no notice. Then came the Act of 1854, and, though it did not deal directly with proceedings in error, it contained enactments as to appeal to the Exchequer Chamber, which proved the death-blow to bills of exceptions in the superior Courts, as from that time they were little required and were rarely resorted to. In the inferior Courts of Record, the right to tender bills of exceptions of course remained—at least, down to the time when the Judicature Acts came into operation. There are, however, few, and possibly no reported instances, of bills of exceptions being in use at this period. None were quoted to us on the argument, and we have not found any ourselves. But this may be accounted for by the fact that at the time we are considering, between 1852 and 1875, the new county courts had been for some time in operation, and the local Courts of Record themselves were very little resorted to, and in fact were almost obsolete, except those Courts which, like the Mayor's Court, London, had special Acts of Parliament, giving appeals and rendering the resort to bills of exceptions as unnecessary as in the superior Courts. We come now to the Judicature Acts. By s. 4 of the Act of 1873, the High Court of Justice was to have such appellate jurisdiction from inferior Courts "as is hereinafter mentioned," which reference appears to be to s. 45. But, by s. 16, the High Court of Justice expressly got all the jurisdiction of the existing Court of King's Bench, and thus clearly got the jurisdiction to deal with error from inferior Courts of Record. By s. 45, "all appeals from petty or quarter sessions, from a county court, or from any other

inferior Court," are to be heard and determined by Divisional Courts. Now on this section Mr. Rowlatt, shewing cause against the rule, remarked that at that date error and appeal were distinct things, and that the lawyers who framed the Judicature Act would never have included "error" in "appeal." There is some force in this; but although it is true that the two things were distinct, yet the word "appeal" is undoubtedly the larger and more general word of the two, and in its wider sense is quite capable of including "error"; and when it is seen that there is, neither in the Act or the rules in the schedule, any other provision whatever as to error from inferior Courts (unless, perhaps, the 49th rule mentioned below abolishes it), we think the more reasonable construction is to hold that the words "all appeals from any inferior Courts" in this s. 45 include error. If this is not correct, by s. 73 the old procedure in error would have been continued by this Act. If s. 45 does include it, the procedure would still have been the old procedure until new rules were made under s. 74. By rule 49 in the schedule to that Act it is said that "bills of exceptions and proceedings in error shall be abolished"; but as this comes amongst the rules relating to procedure in the Court of Appeal, it is doubtful whether proceedings in error from inferior Courts are referred to; and as the Act was only dealing with the High Court, it can hardly be said that bills of exceptions in the inferior Courts of Record could have been abolished by these words. So that, while there is no clear abolition by the Act of 1873 of proceedings in error from inferior Courts, there is certainly no clear expression of intention to continue them, either under the old form or in any new form. It is, however, of course absolutely clear that there is in the Judicature Act and Rules, which were passed to improve procedure and enlarge jurisdiction, no indication of any intention to take away any previously existing rights of suitors, whether of originating proceedings or bringing error or appealing, without substituting new procedure for giving effect to those rights. The schedule to the Act of 1873 was repealed by the Act of 1875; but the same words, "Bills of exceptions and proceedings in error shall be abolished," appear in Order LVIII.,

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r. 1, in the schedule to the Act of 1875; but again the words appear in conjunction with provisions relating to the Court of Appeal. The Act of 1875 contains, in s. 15, an enactment that the enactments as to appeals from county courts might be extended by Order in Council to any other inferior Court, and if this power had been acted on in the case of the Preston Court, it would have prevented the question now before us arising; but no such Order in Council has been made, at all events as to the Preston Court. Practically the Act of 1875 left all the questions we have to consider just as they were left by the Act of 1873. Nor were any rules which throw any light on the matter before us made until after the passing of the Judicature Act of 1884, which, by s. 23, enacted that the power to make rules conferred by s. 17 of the Judicature Act, 1875, should be deemed to include power to make rules for regulating the procedure on appeals from inferior Courts to the High Court. Under this Act the present rules as to appeals from inferior Courts were made, including Order LIX., r. 10, that all such appeals shall be by notice of motion. This concludes the history of the matter, and gives us the material on which our decision is to be based. The result is that, unless error from inferior Courts is included, both in the Acts and Rules, under the words "appeals from inferior Courts," there is no provision for it. All through these enactments and Rules there is no mention whatever of "error from inferior Courts," and no mention of proceedings in error at all, except to abolish them; and although it is doubtful whether this express abolition relates to error from inferior Courts, it is, we think, impossible not to hold that, so far as the superior Court and the procedure in it is concerned, the old form of proceedings in error from inferior Courts is gone, and the new forms of appeal are substituted for them. The High Court of Justice on its creation got the jurisdiction to entertain error from inferior Courts, and that jurisdiction cannot have been lost. If the true view is that the old forms have been abolished, without any clear substitution of the new forms for them, the new forms will nevertheless apply; just as it was held after the abolition of real actions that a

personal action could be maintained for a matter on which previously no personal action lay: *Thomas* v. *Sylvester*. (1) In fact, however, the old forms appear to have gone, not so much by express abolition as by the substitution of the new forms for the old. Turning now to the cases, the only case quoted to us of error brought since the Judicature Acts from an inferior Court was *Le Blanch* v. *Reuter's Telegram Co.* (2) That came from the Mayor's Court, and was brought on notice of motion to the Divisional Court for hearing appeals from inferior Courts; and as the Court of error from the Mayor's Court prior to the Judicature Acts was the Exchequer Chamber, and not the Queen's Bench, the Divisional Court held that the appeal must go to the Court of Appeal, as having the jurisdiction of the Exchequer Chamber. Mellor J., however, appears to have been clearly of opinion that "error" was abolished and "appeal" substituted. And in *Pryor* v. *City Offices Co.* (3) Brett M.R. seems to have been of opinion that error on the face of proceedings in the Mayor's Court was properly brought before the Court of Appeal by way of appeal. We hold, therefore, that error from an inferior Court is now properly brought in the High Court by notice of motion. No difficulty arises from the abolition of the writ of error, by which proceedings in error were formerly commenced; for many matters are now commenced in the High Court without a writ, for instance by originating summons, and county court appeals by notice of motion; and when such matters are, in accordance with the practice of the Court, duly commenced without writ, there is jurisdiction to hear them. There is a somewhat greater difficulty as to the part of the proceedings in the inferior Court prior to the error coming before the High Court—particularly as to the bill of exceptions. In *Reg.* v. *Kettle* (4), a case which decided that the statutory appeal from a county court by special case had been abolished by the High Court Rules, and an appeal by notice of motion substituted for it, Wills J. pointed out that the Act of 1884

(1) (1873) L. R. 8 Q. B. 368.
(2) 1 Ex. D. 408.
(3) 10 Q. B. D. 504, 507.
(4) 17 Q. B. D. 761.

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was unnecessary if it was meant to authorize only rules for the part of the procedure on appeal from inferior Courts which took place in the High Court, and that the power given by the Act of 1884 clearly extended to altering so much of the procedure in the county court as was merely machinery for the appeal. Again, in *Eder* v. *Levy* (1) it was held that, for the old appeal from the Mayor's Court by special case, in cases over 20*l.* there was substituted an appeal by motion, and that the former mode of appeal having been as of right, and without the necessity of the leave of the Court below, the new appeal by motion might be made without leave, notwithstanding a section of the Mayor's Court Act providing that appeals by motion required leave. With these cases quoted by Mr. Danckwerts we must compare the cases quoted by Mr. Rowlatt, namely: *In re West Devon Great Consols Mine* (2), *Morgan* v. *Bowles* (3), and *Kirby* v. *North British and Mercantile Insurance Co.* (4) In the first of these it was held that the Judicature Acts and Rules under them as to inferior Court appeals had not dispensed with the necessity for a deposit as a condition of an appeal under the Stannaries Act. This was put on the ground that the Stannaries Act was special legislation, and, per Bowen L.J., "Generalia specialibus non derogant." In *Morgan* v. *Bowles* (3) it was held that the condition as to deposit imposed by s. 8 of the Mayor's Court Act had not been abrogated by the new rules as to inferior Court appeals. *Eder* v. *Levy* (1) was not quoted to the Court, but the two cases as reported are not necessarily inconsistent, for it does not appear by the report of *Eder* v. *Levy* (1) that the question of deposit was raised. The two cases together bring out clearly the distinction that, while matters of mere procedure for the purpose of getting the appeal before the higher Court can be altered by rules, conditions—subject to which only is there a right of appeal—cannot be so altered. In *Kirby* v. *North British and Mercantile Insurance Co.* (4) a similar decision was given by the Court of Appeal as to the

(1) 19 Q. B. D. 210.
(2) 38 Ch. D. 51.
(3) [1894] 1 Q. B. 236.
(4) [1896] 2 Q. B. 99.

condition of time imposed by the same section of the Mayor's Court Act; and the Court clearly held that the giving of the notice in proper time and the giving of the security were conditions precedent to the existence of the right of appeal.

In addition to the cases quoted to us on the argument, we may refer to the case of the *Attorney-General* v. *Sillem* (1), in which there was, both in the Exchequer Chamber and in the House of Lords, a very great difference of opinion upon the question whether the Court of Exchequer (under the power given to it by the Queen's Remembrancer's Act of making rules for regulating "the process, practice, and procedure" of the Court in revenue cases) could make rules applying the provisions of the Common Law Procedure Acts as to appeals to the decisions of the Court of Exchequer in revenue cases. It was held by a majority, both in the Exchequer Chamber and in the House of Lords, that there was no such power, and that the creation of a right of appeal requires legislative authority. This decision is not in point in the present case, as no question arose there of altering an existing right of appeal by new procedure; but the judgments in both Courts contain much learning on the differences between "error" and "appeal," and as to what is practice and procedure, and what can be done by rules, all of which throws light on the questions before us, and, as we think, justifies the conclusions at which we arrive. To apply these conclusions it becomes necessary to consider whether it was formerly a condition precedent to a right of appeal (or perhaps we should say to a right to bring error) in respect of a misdirection in an inferior Court of Record, that the party should have tendered a bill of exceptions, or whether tendering and getting the seal of the judge to a bill of exceptions was only machinery for the purpose of bringing the case under review in a higher Court. Bills of exceptions were not known to the common law, but were introduced by the statute 13 Edw. 1, st. 1, c. 31 (in the year A.D. 1285); and, as appears from Coke's 2nd Institute, p. 426, the statute was applied in practice (though it did not

(1) (1864) 2 H. & C. 581; 10 H. L. 704.

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in express terms extend) to all Courts of Record; and the case of *Thomson* v. *Davenport* (1) is one of several reported instances of error on a bill of exceptions from an inferior Court being entertained. The object of the bill of exceptions was to put the matter complained of on the record. Then the right to bring error followed. It must be tendered before verdict, and it was held by Holt C.J. in *Wright* v. *Sharp* (2) that, though it need not be drawn up in form at the time it is tendered, yet as it is to become a record the substance of it should be "reduced into writing while the thing is transacting." When sealed by the judge, both parties were concluded by it as to the truth of the matters contained in it: Tidd's Practice, 9th ed. p. 864. The bill of exceptions was, therefore, if procedure, certainly procedure of an important character; but in many points it much resembled a special case signed by the judge at the request of the parties for the purpose of an appeal. As it has been held, in *Reg.* v. *Kettle* (3) and *Eder* v. *Levy* (4), that the statement of a special case was not a condition precedent to the right of appeal from the county court and from the Mayor's Court, but was procedure only, and was abolished by the new procedure, we think we ought not to hold that the actual tendering of a bill of exceptions and getting it sealed is now a condition precedent to the right to bring under review, in a superior Court, the matters which formerly could have been so brought by taking that course. We ought to hold that the bill of exceptions was form only, abolished now, either expressly, or, if not expressly abolished, then abolished by the substitution of new forms. At the same time we must hold that all which was matter of substance in the old form is still a condition precedent to the new appeal. The misdirection must be of a character which could be the subject of a bill of exceptions, and the old authorities on that subject would apply; and, further, the objection must have been taken distinctly, and brought to the judge's attention

(1) 9 B. & C. 78; 2 Sm. L. C. (10th ed.) 368; 32 R. R. 578.
(2) (1707) 1 Salk. 288.
(3) 17 Q. B. D. 761.
(4) 19 Q. B. D. 210.

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before verdict. It may be that this latter requirement adds little if anything to what the House of Lords laid down in *Smith* v. *Baker* (1), as always required on an appeal from an inferior Court. Further, if there were any conditions as to bail or otherwise which were conditions precedent to the right to bring error, they will still be conditions precedent to the right to appeal: *Kirby* v. *North British and Mercantile Insurance Co.* (2)

It rather seems that bail in error was only required as a condition of a stay of execution, and not of a right to bring error (see 19 Geo. 3, c. 70, s. 5; 7 & 8 Geo. 4, c. 71, s. 6); but that, and any other questions of non-compliance with conditions precedent to the existence of the right to appeal in this case, we must leave open to the argument of the appeal. Neither the notice of motion in the case before us, nor the affidavit in support of the rule, shews that there was in fact in this case anything analogous to the tender of a bill of exceptions, but that is probably owing to the fact that, until Mr. Danckwerts was instructed, no one had seen that the only way to support the appeal was as a substitute for error on a bill of exceptions. The notice of motion was refused in the Crown Office on the broad ground that no appeal lay in any case; and we think that we ought to direct the appeal to be entered, and the appellant will have, as in a county court appeal, to shew at the hearing that he took the point of law sufficiently, and took it in time. As to the materials on which the appeal has to be heard, there may be some difficulty, and it may be that it will be found desirable hereafter to make some further Rules of Court as to appeals from inferior Courts in substitution for proceedings in error; but if the rules are defective on this point it does not create any difficulty as to the jurisdiction to entertain the appeal, as Order LIX., r. 8, does, however imperfectly, provide for the case. We think the rule must be made absolute. Of course it is not a case for costs, as cause was only shewn against the rule on behalf of the recorder with the view, no doubt, of assisting the Court; and we are indebted to the counsel on both sides for the

(1) [1891] A. C. 325. (2) [1896] 2 Q. B. 99.

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assistance given to the Court in a matter of some difficulty and which required considerable research.

Rule absolute.

Solicitor for applicant: *H. W. H. Rance, for J. C. Milton, Chorley.*

Solicitor for respondents: *The Solicitor to the Treasury.*

J. F. C.

C. A.

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March 13, 14, 25.

[IN THE COURT OF APPEAL.]

MONTGOMERY & CO. *v.* INDEMNITY MUTUAL MARINE INSURANCE COMPANY, LIMITED.

Marine Insurance—General Average—One Owner of Ship and Cargo—Insurance of Cargo—Liability of Underwriters.

A loss caused by the cutting away of a ship's mast for the safety of the whole adventure is a general average loss to which the underwriters of a policy of insurance on cargo against perils of the sea are bound to contribute, although the assured is owner of both ship and cargo, and, therefore, as between those interests, there can be no contribution to general average.

Decision of Mathew J., [1901] 1 K. B. 147, affirmed.

Judgment of Gorell Barnes J. in *The Brigella*, [1893] P. 189, disapproved.

APPEAL against the decision of Mathew J. (1), where the facts are stated.

The action was brought upon a policy of marine assurance, subscribed by the defendants, on a cargo of nitrate on board the ship *Airlie*, bound from the west coast of South America to the United Kingdom.

The insurance was against perils of the sea and other losses of the same character, and the policy contained the usual sue and labour clause.

The plaintiffs were the owners of both ship and cargo, and they claimed under the policy to recover a general average loss incurred by the cutting away of the ship's mainmast. At the trial the questions raised were—(1.) whether upon the

(1) [1901] 1 K. B. 147.

facts there was a general average sacrifice for the safety of the adventure: (2.) whether, the plaintiffs being owners of both ship and cargo, and there being therefore no possibility of contribution as in the case of separate owners, there could be general average.

Upon the question of fact Mathew J. held that there was a general average sacrifice, and upon this point there was no appeal.

Upon the other point the learned judge, differing from the view of Gorell Barnes J. in *The Brigella* (1), was of opinion that "a general average act is not affected by the consideration whether there will be contribution or not." And he held that the defendants were liable.

The plaintiffs claimed in the alternative under the sue and labour clause, but the learned judge did not deal with that claim.

The defendants appealed.

Scrutton, K.C., and *Loehnis*, for the defendants. It is submitted that Gorell Barnes J. in *The Brigella* (1) was right in holding that there can be no general average contribution where ship and cargo belong to the same owner.

The right to contribution to general average was recognised as existing between the owners of ship and cargo long before marine insurance was introduced. It was founded on the assumption that there were several persons interested in the adventure, and the object was to work out justice as between them. If a loss was incurred of the property of one owner for the benefit of all, all the owners ought to contribute. If ship and cargo belonged to the same owner, he could not contribute to himself. There must be a legal right to recover contribution.

The rights and liabilities of underwriters in such a case are not direct: they arise by subrogation to those of the assured. If there would be no liability to contribute on the part of the assured, there is none on the part of the underwriter: *Simpson* v. *Thomson*. (2) If the ship had been insured and the owner

(1) [1893] P. 189. (2) (1877) 3 App. Cas. 279, 286.

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had claimed for the sacrifice of the mast, the ship underwriter must have paid the whole loss, and he could not have claimed contribution from the cargo underwriter because there would be no right of the owner to which he could be subrogated.

There is no English decision in accordance with the view of Mathew J. though there may be some dicta, nor do the English text-writers take that view: *Dickenson* v. *Jardine* (1); *Atwood* v. *Sellar* (2); *Svendsen* v. *Wallace* (3); *Moran* v. *Jones* (4); *Oppenheim* v. *Fry* (5); *Walthew* v. *Mavrojani* (6); *Burton* v. *English* (7); *Wright* v. *Marwood* (8); *Anderson* v. *Ocean Marine Steamship Co.* (9); Lowndes on General Average, 4th ed. pp. 22, 23; Holt's Law of Shipping, &c., 2nd ed. p. 482; Phillips' Law of Insurance, 5th ed. vol. ii. par. 1269 et seq.; Benecke on Marine Insurance, pp. 165 et seq.; Parson's Law of Marine Insurance, vol. ii. pp. 202 et seq.

Two American cases were relied on for the plaintiffs: *Potter* v. *Ocean Assurance Co.* (10) and *Greely* v. *Tremont Insurance Co.* (11); but the American law of marine insurance differs from the law of England.

There is some evidence as to the practice of underwriters and average staters, but that practice cannot alter the law: *Dickenson* v. *Jardine* (1); *Atwood* v. *Sellar.* (12)

As to the claim under the sue and labour clause, that clause applies to expenses incurred to avert a loss, but it has never been held that it extends to a sacrifice of the subject-matter: *Aitchison* v. *Lohre* (13); *Kidston* v. *Empire Marine Insurance Co.* (14); *Xenos* v. *Fox.* (15)

Carver, K.C., and *J. A. Hamilton, K.C.*, for the plaintiffs. It may be admitted that if there were no insurance there could be no right of contribution in the present case. The argument

(1) (1868) L. R. 3 C. P. 639.
(2) (1880) 5 Q. B. D. 286.
(3) (1884) 13 Q. B. D. 69, 85; (1885) 10 App. Cas. 404.
(4) (1857) 7 E. & B. 523.
(5) (1863) 3 B. & S. 873, 884; (1864) 5 B. & S. 348.
(6) (1870) L. R. 5 Ex. 116.
(7) (1883) 12 Q. B. D. 218.
(8) (1881) 7 Q. B. D. 62.
(9) (1884) 10 App. Cas. 107.
(10) (1837) 3 Sumner, 27.
(11) (1852) 9 Cushing, 415.
(12) 5 Q. B. D. 286, 291.
(13) (1879) 4 App. Cas. 755.
(14) (1866) L. R. 1 C. P. 535; (1867) L. R. 2 C. P. 357.
(15) (1869) L. R. 4 C. P. 665.

on the other side is that the underwriter is bound to contribute only if the owner whom he represents would have to contribute. It is submitted that the question is really an insurance question. What losses does the underwriter undertake to bear? He undertakes to bear particular average loss and general average loss. The question is, what is included in the latter class? The view taken by Gorell Barnes J. in *The Brigella* (1) was that general average loss is that in respect of which contribution would have to be made by the owners. It is submitted that the true view is, that, if there is a general average loss, then there must be contribution. Contribution is a consequence; not the characteristic which denotes the nature of the loss. The mere fact that there is one owner of ship and cargo, and that, consequently, there cannot be contribution, does not alter the nature of the loss. There is really no actual authority for the defendants' contention but the passage which has been referred to in Parson's Law of Marine Insurance, and that does not really support the defendants' argument. The distinction is between voluntary and involuntary loss—between sacrifice and loss. Before *Dickenson* v. *Jardine* (2), underwriters supposed that they were only liable for their own assured's proportion of the loss. They admitted they were liable for general average loss though it was not expressly mentioned in the policy, but they thought that their liability was limited in that way. The distinction between the two kinds of loss is illustrated by *Price* v. *A1 Ships' Small Damage Insurance Association.* (3) The insurance includes contribution which falls on the subject-matter insured. The loss caused by the cutting away of the mast was one which by law ought to be distributed between ship and cargo, and was therefore included in the insurance. According to Gorell Barnes J., the underwriter pays general average only after contribution has been paid by the owner. That makes the payment equivalent to a payment under the sue and labour clause. This theory is supported only by *The Brigella* (1), and it is contrary to *Aitchison* v. *Lohre* (4): vide judgment of Lord Blackburn. The true theory, it is submitted,

(1) [1893] P. 189.
(2) L. R. 3 C. P. 639.
(3) (1889) 22 Q. B. D. 580.
(4) 4 App. Cas. 755, at p. 765.

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is that adopted by Mathew J., namely, that the sacrifice of a part of the ship is by law distributable over ship and cargo—a loss which falls on all the interests—and is therefore covered by the policy. Contribution is not essential to the liability of the underwriter. General average loss is one which ought to be borne by the totality of ship and cargo: Emerigon (Meredith's edition), cap. 12, sect. 39, p. 463. The same view is taken in the French Code de Commerce.

The mast was no doubt cut away really with the view of saving the lives of the master and crew, but that does not prevent its being a general average loss. Jettison has been justified on the ground of saving life: *Mouse's Case.* (1)

It is true that there are no English authorities directly in favour of the plaintiffs' view, though there are the two American cases, but there are various dicta as in *Moran* v. *Jones* (2); *Oppenheim* v. *Fry* (3); Benecke on Marine Insurance, p. 473; Phillips' Law of Insurance, 5th ed. pars. 1273, 1274.

The custom of underwriters has been to pay general average loss without reference to contribution and without waiting until it has been made.

Scrutton, K.C., in reply. It is submitted that the duty of the underwriters is only to indemnify the assured against contribution. The parties to an adjustment are always the owners of the different interests. The cargo owner could not sue the ship underwriter directly. The theory of general average is contribution to a loss by the perils of the sea or to avert the perils of the sea: *SS. Balmoral Co.* v. *Marten.* (4) The passages relied on in *Moran* v. *Jones* (2) and *Oppenheim* v. *Fry* (5) were obiter dicta.

Cur. adv. vult.

March 25. VAUGHAN WILLAMS L.J. read the following judgment of the Court (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.):—This case raises a question of great importance. The circumstances of the case are such as, it is admitted, would

(1) (1608) 12 Rep. 63.
(2) 7 E. & B. 523.
(3) 3 B. & S. 873, 884.
(4) [1901] 2 K. B. 896, 902.
(5) 3 B. & S. 873.

give rise to a general average claim if the ship and cargo belonged to different owners; but it is said that there can be no general average claim, because the ship and cargo both belonged to the plaintiffs, and as there could be no contribution there was no general average loss. Mathew J. has held that a general average act is not affected by the consideration whether there will be a contribution or not. This holding is contrary to the opinion expressed by Gorell Barnes J. in *The Brigella* (1); and we have now to consider which view is right. We agree with the view of Mathew J. (now Mathew L.J.), and, moreover, we agree so entirely with the reasons which he has given for the conclusion at which he has arrived that we should not feel it necessary to add a word to those reasons, if it were not that we think we ought to deal particularly with the reasons expressed by Gorell Barnes J. in his judgment in *The Brigella* (1), and ought to state the principles upon which we think the law of general average loss should be based. As we understand the judgment of Gorell Barnes J., he is of opinion, first, that there cannot be a general average act, or a general average loss, unless there are separate interests in the maritime adventure, because contribution is of the essence of the maritime law of general average; and there cannot be contribution unless there is diversity of interests; and we understand him to go further and say that, even if there can be a general average act in a case in which ship, cargo, and freight belong to one adventurer only, yet the law of contribution cannot be applied, for the right of contribution only belongs to the adventurer who had an interest at risk against an adventurer whose goods have been saved by the general average act, and that it is impossible for an adventurer to enforce by legal proceedings a claim against himself in respect of the salvage of one part of his property by the sacrifice of another. It is said that such a right, if it existed, could only be enforced by the adventurer suing himself, which is impossible. It is said, further, that the fact that the ship, freight, and cargo have been insured with different underwriters can make no difference, because the only interest which the underwriters have is a

(1) [1893] P. 189.

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subrogated right which they must enforce, if at all, in the name of the assured, as the owner of the property sacrificed by the general average act, against the same person, as the owner of the property saved by that sacrifice. It is said that the obligation to contribute to general average exists between the parties to the adventure, whether they are insured or not, and that the circumstance of a party being insured had no influence upon the adjustment of the general average. It seems to us that the question, whether contribution is of the essence of a general average loss or a mere incident of it, must depend upon the occasion which is a condition of such an act. It is not, we think, true to say that it is only the danger to the ship, freight, or cargo which necessitates and justifies sacrifice by the master of either a portion of the cargo or a portion of the ship. This may be done in fear of death, and if it is done upon a proper occasion all must contribute to the loss. If there be one owner of ship, freight, and cargo he will bear it all. If there be several, each will contribute according to the value of his interest. The object of this maritime law seems to be to give the master of the ship absolute freedom to make whatever sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and, in our judgment, such a sacrifice is a general average act, quite independently of unity or diversity of ownership.

Assuming that the general average act and the general average loss can occur independently of contribution, there still remains the question, whether the underwriters on a policy on cargo can be held liable to pay to an owner of ship and cargo, by reason of his insurance of cargo, the contribution which the cargo owner, if he had been another person than the shipowner, would have had to pay to the shipowner in respect of the general average loss incurred by cutting away the mast. It is said that the shipowner could not have recovered against himself as cargo owner this contribution, and that, as the only liability of the underwriter on cargo is to pay as a general average loss a contribution which the cargo owner could be compelled to pay, he has no obligation to recoup the cargo owner a contribution which he has not paid, and could not be compelled to pay. In

other words, it is said that, as the cargo owner has suffered no loss, he can therefore claim no indemnity. If this is the true view, the converse view would also seem to be true—namely, that the underwriter on a policy on the ship must pay the whole of the ship's loss by the general average sacrifice without getting the benefit of any contribution from cargo belonging to the shipowner which had the benefit of the sacrifice. But we do not think that this is the true view. We will take first the case of the shipowner who has insured his ship, and there has been a general average sacrifice and loss by cutting away the masts to avert the instant perils of the sea. We will assume there is cargo on board belonging to the shipowner. What is the liability of the underwriter on the policy on the ship? It seems to us that his liability is to pay the loss incurred by cutting away the masts, less the contribution by the shipowner on account of the cargo. I see nothing in *Dickenson* v. *Jardine* (1) to prevent this, because the shipowner has already in his pocket his own contribution as cargo owner, and his loss is ascertained to be the cost of replacing the masts, less his own contribution as cargo owner. It will be observed that in *Dickenson* v. *Jardine* (1) jettison was expressly covered by the policy, and the assured had not received the contributions of the other owners, and that therefore the underwriters could, upon indemnifying the assured, recover the contributions in his name, whereas in a case like the present the assured has in his pocket his own contribution, so that there is no contribution to be recovered, and the assured's loss has been pro tanto reduced before he makes any claim on the underwriters.

But suppose he has effected a policy on cargo. What is the liability of the underwriters of the policy on cargo? Surely they are liable to pay the loss of the shipowner by reason of the deduction made by the underwriters of the policy on the ship in respect of the shipowner's contribution as the owner of the cargo; and mutatis mutandis a similar result is arrived at if the general average sacrifice is by jettison of cargo, and ship and cargo have a common owner.

With regard to the right of the underwriter, when the

(1) L. R. 3 C. P. 639.

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assured is owner of ship and cargo, to deduct the contribution due from the ship or cargo, as the case may be, we will quote the words of Shaw C.J. in *Greeley* v. *Tremont Insurance Co.* (1), who, after stating that the underwriter is liable directly to the assured for a loss in its nature a general average loss, that is, resulting from a voluntary sacrifice, without waiting to collect the contributory shares from other persons, said: "But the rule does not apply where the assured is owner of the vessel and cargo. Then, as owner of the cargo, being bound to contribute, he is deemed to have the contribution in his own hands, and therefore is clearly pro tanto indemnified, and cannot collect of the underwriter a sum of money to be recovered back by the underwriter of himself." It seems to us that this passage is quite right, and a working out of the principle on which the law of general average is based. This view seems to us to obviate any difficulty arising from the fact that a man cannot sue himself, and from the legal proposition that the only right of the underwriter in respect of collection of contributions is to sue in the name of the assured.

There is nothing in this conclusion contrary to any English authority. It is true that no English case expressly decides the point. But there is a dictum of Lord Campbell in *Moran* v. *Jones* (2), and an opinion of Blackburn J. in *Oppenheim* v. *Fry*. (3) In the former case Lord Campbell said (4): "And, where there are separate insurances on ship and freight, the calculation must be made as to the amount of the contribution by each, although the whole of the freight which was in peril is to be received by the owner of the ship, and without insurance the whole loss would fall upon him." And in the latter case Blackburn J. said: "I think it is not necessary for the decision of this case to say whether the extraordinary expenditure was general average or not, though I have a strong impression that, where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average; whether the ship and cargo and freight belong to one only or to different adventurers." Against this there is the opinion of Gorell

(1) 9 Cushing, at p. 419.
(2) 7 E. & B. 523.
(3) 3 B. & S. 873.
(4) 7 E. & B. 523, at p. 533.

Barnes J. expressed in *The Brigella*. (1) American authority, as we have already said, is strongly in favour of the view expressed by Mathew J., and the whole question is so well discussed by Story J. in his judgment in *Potter* v. *Ocean Assurance Co.* (2) that we feel that it will illuminate the argument we have tried to express in this judgment if we quote a passage in which that learned judge deals with the question. It runs thus (3): "But the argument is, that here there was no cargo on board, and that there can be no contribution by freight or cargo, but the whole is to be borne by the ship; and that, therefore, it is a particular average on the ship, and not a general average. The argument proceeds upon the ground, that what is, and what is not, a general average does not depend upon the nature and objects of the thing done, or sacrifice made, for the general good; but solely upon the point, whether there are in fact different contributory subjects. I do not so understand the law. As I understand it, the rule, as to what constitutes a general average or not, is founded upon the consideration, whether it is for the benefit of all, who are, or may be, interested in the accomplishment of the voyage; or only for the benefit of a particular party. Suppose a person to be owner of the ship and cargo, and, of course, ultimately of the freight also; and he should insure the ship, cargo, and freight in three different policies, by different offices; if a jettison should be made, or a mast be cut away, or any other sacrifice be made for the common benefit of all concerned in the voyage; there can be no doubt that this would be a case of general average, and the underwriters on ship, cargo, and freight must all contribute as for a general average. What possible difference in such a case could it make, that the same underwriters were underwriters in one policy on the ship, cargo, and freight? or that the owner singly had no insurance at all, or an insurance upon one only of the subjects put at hazard? Must not the loss still be treated in the contemplation of law as a general average or in the nature of a general average? As I understand it, the phrase, 'general average,' as found in our policies

(1) [1893] P. 189. (2) 3 Sumner, 27.
(3) 3 Sumner, at p. 39.

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of insurance, is used in contradistinction to particular average. It means a voluntary sacrifice for the benefit of the voyage, and not merely an involuntary encounter of a loss without action or design. It looks to the efficient cause of the loss; and not to the effects of it. It looks to the consideration, whether the act is intended for the benefit of all concerned in the voyage; and not in particular to the consideration, who are to contribute towards the indemnity. To be sure, if the owner stands as his own insurer throughout, the question degenerates into a mere distinction, for it is a pure speculative inquiry. Not so, when there is an insurance; for in such a case the underwriters are pro tanto benefited by the sacrifice or other act done; and they are in a just sense bound to contribute towards it."

We have only to add, generally, that, in our judgment, the underwriters have throughout the adventure such an inchoate property and liability to loss as to make it right, within the true principle of the law of general average, that upon the adjustment their right to contribution and their loss as underwriters, as the case may be, should be taken into consideration in the final account.

Moreover, it is further well worthy of observation that the view of the law which we have taken agrees with the practice of average-staters and underwriters, both before and since the decision in *The Brigella* (1); and this practice is, in our opinion, really essential if the spirit of the law of general average is to be applied to the conditions of navigation at the present day. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Waltons, Johnson, Bubb & Whatton; William A. Crump & Son.*

(1) [1893] P. 189.

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1902
March 10.

WRIGHT *v.* GLYN.

Master and Servant—Liability of Master—Forage supplied by Direction of Coachman—Authority to pledge Credit of Master.

The relation of master and coachman does not clothe the latter with ostensible authority to pledge his master's credit for forage supplied for his horses.

Precious v. *Abel*, (1795) 1 Esp. 350, and *Rimell* v. *Sampayo*, (1824) 1 C. & P. 254, commented on.

APPEAL from the judgment of Grantham J. at the trial of the action without a jury.

The action was brought by the plaintiff as representative of one Trigg, deceased, for the price of forage supplied by Trigg, through his manager Bates, upon the order of the defendant's coachman and consumed by the defendant's horses. It appeared that the defendant made an agreement with his coachman to pay to him in addition to his wages a fixed amount per week per horse, and that he should on his part undertake to pay for the necessary forage and the cost of shoeing. The coachman applied to Bates to supply the forage, and stated that he was coachman to the defendant. Bates did not communicate with the defendant, but made some inquiries as to his position, and, the answers received being satisfactory, the forage was supplied for a considerable time. The defendant never had any dealings with Bates or the deceased. The coachman received the agreed weekly sum from the defendant, but did not pay for the forage. A bill was ultimately sent to the defendant, who denied liability, and this action was brought. It appeared by the evidence given at the trial that such an arrangement as that made by the defendant with his coachman was known to dealers in forage. At the trial the cases of *Precious* v. *Abel* (1) and *Rimell* v. *Sampayo* (2) were cited, and on the authority of those cases the learned judge gave judgment for the plaintiff.

The defendant appealed.

(1) 1 Esp. 350. (2) 1 C. & P. 254.

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March 5. *Danckwerts, K.C.*, and *Loehnis*, for the defendant. To make the defendant liable there must be actual or ostensible authority in the coachman to bind his master. Here there was neither—clearly there was no actual authority, and the mere fact of the relation of master and servant is not sufficient to shew that the latter is entitled to pledge the credit of his master. The two Nisi Prius cases on which the learned judge decided are of doubtful authority, and are opposed to Lord Ellenborough's decisions in *Hiscox* v. *Greenwood* (1) and *Rusby* v. *Scarlett*. (2) There had been no dealings between the forage dealer and the defendant, and there was no ratification. There was, therefore, nothing on which the defendant could be held liable.

[They cited *Stubbing* v. *Heintz* (3); *Pole* v. *Leask* (4); *Payne* v. *Lord Leconfield*. (5)]

Theobald Mathew, for the plaintiff. A coachman has ostensible authority to order the necessary forage for his master's horses, for that is the common practice, though it was admitted that in a certain number of cases arrangements such as that made in the present case existed. That being the common practice, if any limitation is put on the authority by the master it is his duty to give notice of this. In the present case there was a direction to the coachman that he should take upon himself the duty of ordering forage. If a servant is performing an act within the scope of his ordinary service, a tradesman is justified in assuming that he has authority, and is not put on inquiry: *Alexander* v. *Gibson*. (6) That was a case of a warranty of horses by a servant where the master had limited the authority to warrant, but was held liable. [He cited also *Rich* v. *Coe* (7); *Brady* v. *Todd* (8); *Farquharson Brothers & Co.* v. *King & Co.* (9)]

Danckwerts, K.C., in reply.

Cur. adv. vult.

(1) (1802) 4 Esp. 174.
(2) (1803) 5 Esp. 76.
(3) (1791) 1 Peake, 66; 3 R. R. 651.
(4) (1863) 33 L. J. (Ch.) 155.
(5) (1882) 51 L. J. (Q.B.) 642.
(6) (1811) 2 Camp. 555; 11 R. R. 797.
(7) (1777) 2 Cowp. 636.
(8) (1861) 30 L. J. (C.P.) 223; 9 C. B. (N.S.) 592.
(9) [1901] 2 K. B. 697.

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March 10. COLLINS M.R. read the following judgment:— This is an action brought by the plaintiff, as representative of one Trigg, deceased, a corn-merchant, for 95*l.* 2*s.* 6*d.*, being the price of forage supplied by the deceased on the order of the defendant's coachman and consumed by the defendant's horses. The defence is that the coachman had no authority to pledge his master's credit for the forage. Grantham J. has given judgment for the plaintiff, and the defendant now appeals.

The facts lie in a very short compass, and the evidence consists of certain affidavits made under Order XIV., supplemented by the evidence given at the trial by Bates, the manager of the deceased, and by that of Mr. Glyn, the defendant. The coachman was not called.

It appears that one Dimont, the coachman or groom—he is called sometimes one and sometimes the other in the evidence, and it does not seem to be material which was his true capacity—was employed by the defendant under an arrangement that the defendant should pay him a certain sum per week per horse, and that he should for such payment supply forage and shoeing. It appeared from Bates's evidence that Dimont had called and said he wanted to open an account for forage for Mr. Glyn; that he thereupon took the order and made the usual inquiries about Mr. Glyn, and then delivered the goods, and continued to supply them till the defendant's horses left town in the following November; and he swore that he gave credit to the defendant, to whom in November he forwarded a statement of account at his address in London. The defendant had then left England for South Africa, and had never had any dealings whatever with Bates or his employer, nor was he aware till his return from South Africa from whom Dimont had ordered forage, or that it had not been paid for. The agreed payments to Dimont had been regularly made. Bates admitted that he was aware that some of his customers —perhaps 10 per cent.—had arrangements with their coachmen similar to that made by the defendant, but, he added, "the coachmen then say so."

The question, therefore, is, on these facts, Has the plaintiff proved his claim against the defendant? I am of opinion that

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he has not. There can be no question as to the law in the matter. In order to fix the principal for an order given by a person purporting to be his agent, it is quite clear that either actual or ostensible authority to contract for the principal, or ratification, must be proved. Here express authority is distinctly negatived, and the case for the plaintiff must rest on ostensible authority alone. It certainly cannot be said, as a matter of law, that a coachman or groom has ostensible authority to pledge his master's credit for forage for his horses. The mere relation of master and coachman does not of itself involve as a matter of law such authority. If that be so, it becomes a pure question of fact—Was there evidence of a holding out by the defendant of Dimont as having his authority to pledge his credit? It seems to me there was none. The defendant is never introduced into the discussion at all by any act done by him except that of taking Dimont into his service. Bates acted on the representations made to him by Dimont, and on nothing else. He took the risk of those statements being true or false; and though he learnt that Dimont was the defendant's coachman, and was aware that arrangements, such as that here proved, sometimes existed between coachmen and their masters, he took no trouble to ascertain from the defendant whether any such arrangement existed between him and Dimont. Unless, therefore, the fact that Dimont stated with truth that he was the defendant's coachman amounts to a holding out by the defendant of Dimont as having authority to pledge the defendant's credit for forage, there is literally no evidence to fix the defendant in this case.

We are not at liberty to try this case upon any facts except those which appear in evidence; and we certainly cannot assume, as we were invited to do by plaintiff's counsel, that it must be taken as common knowledge that coachmen have primâ facie authority to pledge their masters' credit for forage, and that the onus is thrown on the defendant of making the fact of any limitation of any such authority known to persons who supply forage. Could it be said that where the master himself makes a contract with a corn-merchant for the foraging

of his horses, the coachman has, nevertheless, ostensible authority to bind the master by other contracts made with other persons to supply it, or that, where the master supplies his own forage, the coachman, by virtue of his position, has ostensible authority to order it elsewhere? Suppose the contract with the coachman were that he should supply horses, carriage, and forage for a lump sum, could he, nevertheless, make the master liable to the corn-merchant on the footing of ostensible authority? Suppose all are hired from a liveryman, who himself acts as coachman, is the master liable to the person who supplies the forage? A contractor to supply is not an agent to procure.

The learned judge seems to have considered himself bound by the two Nisi Prius decisions, which were cited before us, in Carrington and Payne and Espinasse respectively; but, as I have already pointed out, there can be no dispute here as to the law, and those cases must be taken to have been decided on special facts; and it is enough to say that in the present case actual authority is negatived, and that there is no evidence whatever either of ostensible authority acted upon by the plaintiff, or of ratification by the defendant. For the same reason I abstain from discussing the other cases cited in argument.

I think this appeal must be allowed.

Romer L.J. has read and agrees with this judgment.

MATHEW L.J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Charles Russell & Co.*

Solicitors for defendant: *Waterhouse, Winterbotham, Harrison & Harper.*

A. M.

1902
Feb. 28;
March 3.

LONDON AND INDIA DOCKS COMPANY, APPELLANTS *v.* BOROUGH OF WOOLWICH, RESPONDENTS.

Metropolis — Rates — Partial Exemption of Land covered with Water in Woolwich—London Government Act, 1899—*Continuation of Exemption—Land covered with Water not separately assessed in Valuation List—Rate made upon Full Value of the Whole Hereditament—Right of Appeal to Quarter Sessions without Objection before Assessment Committee—London Government Act*, 1899 (62 *&* 63 *Vict. c.* 14), *ss.* 10, 19—17 *Geo.* 2, *c.* 38, *s.* 4.

Before 1900 general district rates were made in Woolwich under the Public Health Act, 1875, under s. 211 of which the owners and occupiers of land covered with water were liable to be assessed to certain rates upon one-fourth part only of the annual value thereof. The London Government Act, 1899, by s. 10, provided that a scheme under the Act should provide for protecting the interests of owners and occupiers of any hereditament exempt for any rate or liable to be assessed thereto at a less amount than other hereditaments; and, by s. 19, that a scheme under the Act should provide for placing Woolwich under the general law applicable to metropolitan boroughs and for the repeal of the application thereto of the Public Health Acts; and the schemes made under the Act provided accordingly. The owners of land in Woolwich, part of which was covered with water, were assessed in the valuation list in one amount for the whole hereditament, and in 1901 were rated in respect thereof to the general rate upon the full annual value and to the full amount of the rate. The owners appealed to quarter sessions against the rate:—

Held, that the partial exemption of land covered with water in Woolwich was preserved, and that the owners were liable to be assessed in respect thereof upon one-fourth part only of the annual value:

Held, also, that the owners were entitled to appeal to quarter sessions against the rate without first objecting to the valuation list before the assessment committee.

CASE stated pursuant to s. 11 of 12 & 13 Vict. c. 45 on an appeal to the London Quarter Sessions against a general rate.

The appellants were the owners and occupiers of hereditaments in the metropolitan borough of Woolwich, and in a general rate for the borough, made under the London Government Act, 1899, on the 21st March, 1901, they were rated in respect of those hereditaments upon the full net annual value and to the full amount of the rate. The hereditaments consisted in part of land covered with water, and before April 1,

1901, the appellants were liable to be assessed, and were in fact assessed, to general district rates for Woolwich, made under the Public Health Act, 1875, in respect of the land covered with water upon a fourth part only of the net annual value.

In October, 1900, the appellants gave notice of objections to the valuation list for Woolwich, made on June 22, 1900, upon the ground of the unfairness and incorrectness of the valuations of their hereditaments, and specified the corrections which they desired to be made. On October 26, 1900, the assessment committee heard and decided those objections upon the basis of an agreed alteration in the amounts of the assessments. No objection was made by the appellants to the description of the hereditaments in the valuation list. In the valuation list the descriptions of the hereditaments were as follows: "Royal Albert Dock (part of) with tidal basin, quays, buildings, and machinery," and "Old and new dock entrances, Galleons Reach, and appurtenances."

By virtue of various statutes general district rates were made by the local board in Woolwich, from 1852 to 1891, under the Public Health Act, 1848, and after 1891 under the Public Health Act, 1875. By s. 88 of the Public Health Act, 1848, the material parts of which were repeated in s. 211 of the Public Health Act, 1875, it was provided that, in respect of general district rates, "the occupier of any land covered with water . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

The London Government Act, 1899 (62 & 63 Vict. c. 14), provided, by s. 10, sub-s. 1, that "A scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments"; and s. 19, sub-s. 1, provided that "A scheme under this Act shall provide for placing Woolwich under the general

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law applying to metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts and other enactments not applying to London, and for the application thereto of the Metropolis Management Acts, 1855 to 1893, and other enactments applying to London. (2.) Subject to the provisions of any such scheme, this Act shall apply to Woolwich in like manner as if the local board of health thereof were an administrative vestry."

The London (Woolwich) Scheme, 1900, confirmed by an Order in Council on August 7, 1900, provided that, "(1.) This scheme shall have effect subject to the provisions of any future scheme made under the Act, and in particular to the provisions of any such scheme making provision for protecting the interests of owners and occupiers of any hereditaments which are exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments. (2.) Subject to the provisions of this scheme the general law applying to metropolitan boroughs shall, as from the day on which the first borough councillors elected under the Act come into office, apply within the parish of Woolwich in like manner as it applies to the rest of London, and accordingly the Public Health Acts and other enactments not applying to London shall, as from that date, and so far as they apply to the parish of Woolwich, be repealed, and the Metropolis Management Acts, 1855 to 1893, and the other Acts applying to London, so far as they do not before that date apply to the parish of Woolwich, shall apply to that parish in like manner as they apply to the rest of London. Provided that nothing in this section shall affect the nature of any rate to be levied in the parish of Woolwich between the said day and the 31st day of March, 1901, and in the meantime sections 207 and 209–227 of the Public Health Act, 1875, shall continue to apply to Woolwich."

The London (Rating) Scheme, 1901, confirmed by Order in Council on March 9, 1901, provided that, "2.—(1.) In levying the general rate after the 1st April, 1901, effect shall be given to any exemption from any existing rate (whether that exemption is given by way of reduced assessment or by levying a

differential rate in the pound or in any other manner) by means of the deduction from the total amount of the general rate which would otherwise be payable in respect of any hereditament to which the exemption applies of a proportionate part (corresponding to the exemption) of the amount produced by the rate in the pound which is treated as levied for the purposes in respect of which the exemption exists, or, in the case of a total exemption, equal to the whole amount so produced. (2.) Where in any metropolitan borough the owners or occupiers of any hereditaments or any class of hereditaments are entitled to any exemption, the council of that borough shall apportion the total rate in the pound amongst the various purposes for which the general rate is levied, so as to shew approximately the rate in the pound required for any purpose or any number of purposes in respect of which there is any such an exemption, and shall enter the rates in the pound so apportioned in the heading of the rate, and the rates in the pound so apportioned and entered shall be treated as levied for the purposes in respect of which the exemption exists."

The appellants contended—(1.) That the effect of the London Government Act and the orders and schemes made thereunder was, that the partial exemption of land covered with water from the general district rate formerly levied in Woolwich was preserved. (2.) That, in respect of land covered with water, they were entitled to a partial exemption as to so much of the general rate as was made for the purposes for which the general district rate was made before the commencement of the operation of the London Government Act, and the orders and schemes thereunder, and that a proportionate part (corresponding to the said partial exemption) should be deducted from the total amount of the said general rate which would otherwise be payable by the appellants in respect of their said hereditaments.

The respondents contended—(1.) That the appellants, having objected before the assessment committee of the union only to the amounts of the assessments, were not aggrieved by any decision of the assessment committee, and were not, therefore,

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entitled to appeal to the court of assessment sessions. (2.) That the appellants were liable to be assessed to the general rate, in respect of their land covered with water, upon the full net annual value for the following reasons: (*a*) because s. 211 of the Public Health Act, 1875, was, from November 1, 1900, repealed in its application to Woolwich by s. 19 of the London Government Act, 1899, and the order and scheme made thereunder, and the said exemption was not preserved by the said Act or any order or scheme made thereunder; (*b*) because the London (Woolwich) Scheme, 1900, provides that ss. 207 and 209–227 of the Public Health Act, 1875, shall continue to apply to Woolwich to March 31, 1901, only, and does not provide that those sections shall continue to apply to Woolwich after March 31, 1901; (*c*) because the intention of the Legislature, as expressed in s. 19 of the London Government Act, 1899, and given effect to by the said orders and schemes, was to place Woolwich for all purposes under the general law applicable to the metropolis, to which it had, prior to the passing of that Act, been an exception, and not to continue for any purpose the application thereto of the Public Health Act, 1875.

The questions for the opinion of the Court were whether the appellants were entitled to appeal, and, if so, whether they were liable to be assessed to the general rate, in respect of land covered with water, upon the full net annual value thereof, or were entitled to the partial exemption.

Ryde (*Balfour Browne*, *K.C.*, and *Boyle*, *K.C.*, with him), for the appellants. There is a right of appeal to quarter sessions in this case. The appeal is brought under s. 4 of 17 Geo. 2, c. 38 (1), which is still in force and applies to the metropolis, and which gives a general right of appeal to quarter

(1) 17 Geo. 2, c. 38, s. 4: "In case any person . . . . shall find himself aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein . . . . it shall and may be lawful for such person in any of the cases aforesaid . . . . to appeal to the next general or quarter sessions of the peace for the county," &c.

sessions to any person who is aggrieved by any rate or assessment. The statutes which followed and modified or limited the right of appeal, the Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), and the Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39), do not apply to the metropolis. It is said, however, that the right of appeal in the metropolis is limited by s. 45 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), which makes the valuation list conclusive as to the gross and rateable values of the hereditaments inserted therein, and that there is now no appeal to quarter sessions unless the appellant is aggrieved by a decision of the assessment committee. That Act, however, only affects appeals against gross and rateable values, and an appeal upon any other ground can still be brought direct to quarter sessions under s. 4 of 17 Geo. 2, c. 38: *Reg.* v. *Institution of Civil Engineers* (1); *Smith* v. *Lambeth Assessment Committee* (2); *Art Union of London* v. *Savoy Overseers.* (3) The valuation list is conclusive only as to what it does state—that is, as to the total gross and rateable values of this hereditament as a whole; but it is not conclusive as to the right to have it divided: *Gordon* v. *Williamson.* (4)

Upon the other point, it is expressly provided by the London Government Act, 1899 (62 & 63 Vict. c. 14), that all total and partial exemptions are to be preserved, and the schemes made under the Act do expressly preserve those exemptions. The right of owners or occupiers in Woolwich of land covered with water to be assessed upon one-fourth only of the annual value thereof is an exemption preserved by the Act and schemes.

F. Marshall, K.C., and *Courthope Munroe*, for the respondents. The appellants have no right of appeal to quarter sessions upon this question because they have not first applied to the assessment committee to correct the valuation list by dividing the assessment. Sect. 45 of the Valuation (Metropolis) Act makes the valuation list conclusive for this purpose, and no appeal lies unless the person appealing is aggrieved by a

(1) (1879) 5 Q. B. D. 48.
(2) (1882) 10 Q. B. D. 327.
(3) [1894] 2 Q. B. 609.
(4) [1892] 2 Q. B. 459.

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decision of the assessment committee upon an objection to the valuation list. It must be necessary that the valuation list should shew separately the two parts of the hereditament so as to shew the annual value of that part for which the partial exemption is claimed. Sect. 11 of the Act of 1869 gives the assessment committee in the metropolis larger powers than an assessment committee has under the Union Assessment Acts, and it could consider this objection; the appellants could say that the valuation list was incorrect because it did not shew separately the part of the hereditament which was entitled to the exemption, and the assessment committee would be the proper tribunal to decide the matter and correct the list.

The appellants are not entitled to the exemption which they claim. Sect. 19, sub-s. 1, of the London Government Act, 1899, provides that Woolwich shall be placed under the general law applying to the metropolis, and that the provisions of the Public Health Acts shall cease to apply thereto. It was not intended that any of the exemptions given by the Public Health Acts should continue. The exemptions dealt with by s. 10 are exemptions of particular hereditaments, and not such exemptions as were given by the Public Health Acts. Although s. 19, sub-s. 1, provides that provisions of the Public Health Acts as applying to Woolwich shall be repealed, the contention of the appellants is in effect that certain very important provisions of the Public Health Acts still apply to Woolwich. There is no exemption in favour of land covered with water in any other part of the metropolis, and, if this exemption still continues in Woolwich, the intention of the Act of 1899 that the same general law shall apply to the whole metropolis will be defeated.

Ryde, in reply.

Cur. adv. vult.

March 3. LORD ALVERSTONE C.J. The facts of this case are rather complicated. Prior to the passing of the London Government Act, 1899, the district of Woolwich was subject to the Public Health Act, 1875, under s. 211 of which there is an exemption in respect of land covered with water pro-

viding that it shall be rated upon one-fourth only of its annual value for certain rates. The district was also subject at that time to the Valuation (Metropolis) Act, 1869, and therefore, for the purposes of rating procedure, the provisions of that Act applied. By s. 19, sub-s. 1, of the Act of 1899 it was provided that a scheme under the Act should provide for placing Woolwich under the general law applicable to metropolitan boroughs and for the repeal of the application thereto of the Public Health Acts; and, by s. 10, sub-s. 1, that a scheme under the Act should provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of separate sewers and lighting rates, but should make provision for protecting the interests of owners and occupiers of any hereditament which was exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments. The London (Rating) Scheme, 1901, by s. 2, sub-s. 1, did provide for maintaining the exemption by a particular method of levying the rate. The question in this case arises upon the valuation list for 1900. The respondents sought to charge the appellants upon the full assessment, and they justify that upon two grounds. First, they say that it was intended by the Act of 1899 to bring Woolwich within the general law applying to metropolitan boroughs, and that, therefore, inasmuch as in some other parts of the metropolis there was not the exemption given by s. 211 of the Public Health Act, 1875, it was not intended that the exemption should be continued in Woolwich. We are all clearly of opinion that this contention cannot be maintained. Sect. 10, sub-s. 1, of the Act of 1899 provides expressly that a scheme shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments. We think that it was clearly intended that, although Woolwich and other outlying places were to come within the metropolis generally, yet that exemption should continue. The scheme has continued the exemption, and it cannot be said that in this respect the scheme was ultra vires. Therefore we think that this contention of the respondents cannot prevail.

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The other point raises more difficulty: it is whether the appellants could raise this question, inasmuch as they had not applied to the assessment committee for a division of the rateable value, the total of which was not objected to, between the part of the property which was not, and the part which was, exempt. The total assessment was agreed to before the assessment committee, and the appellants did not then ask the assessment committee to divide the assessment between the part of the hereditament which was land covered with water and the part which was not. We are of opinion that this objection cannot prevail, and that the appellants are entitled to raise the question. The original right of appeal dates back to 17 Geo. 2, c. 38, s. 4. The intermediate legislation, the Parochial Assessment Act, 1836, and the Union Assessment Committee Acts of 1862 and 1864, do not apply to the metropolis; but I do not express any opinion whether this kind of objection must be raised before the assessment committee even under those Acts. I doubt whether any owner of a mixed hereditament can force the assessment committee to make the division. There are certainly cases in which he cannot do so, such as the simple and ordinary case of a man who has a park with a lake in it; but we need only say that it is unnecessary for us to decide now whether under those Acts the person assessed can compel the assessment committee to make a division of the assessment. No doubt it would be very convenient to have such a division, because it might provide the basis for levying these differential rates. In the metropolis the case is somewhat different, and the rights and liabilities of the parties depend upon the Valuation (Metropolis) Act. It was contended on behalf of the respondents that, because s. 45 of that Act provides that the valuation list shall be conclusive evidence of the gross and rateable values of the several hereditaments included therein, the appellants were not entitled, for the purpose of this appeal, either to contest the total amount or to raise the question that it ought to have been divided. If there had been anything in the provisions of the Valuation (Metropolis) Act which shewed that this question was intended to be raised either before the assessment committee or upon the appeal as to value,

there might have been something in that contention; but I think that it is much too late to contend that the right of appeal upon grounds other than those mentioned in s. 45 has been taken away. There have been many cases in which it has been held that, upon an appeal against a rate, other questions can be raised than those determined by the assessment committee or by quarter sessions upon appeal against the valuation list—for instance, non-occupation or invalidity of the rate in other respects; and I see no reason why the objection that a person is entitled to be rated upon one-fourth only of the value of the property cannot be raised upon an appeal against the rate. In my opinion the old right of appeal upon such a ground still remains, and the effect of the valuation list for this purpose is only that the total valuation is conclusive, or, if there has been a division of the assessment made in the valuation list, the valuation of each divided part is conclusive. I cannot hold that the appellants were bound to have the division made in the valuation list.

There is another ground also which seems to be conclusive in favour of the appellants. I think that the argument, that at the time when this valuation list was being settled it was not known what the position of Woolwich would be, was well founded; it was not known in what way the scheme would provide for the preservation of the exemptions, and I do not think that in those circumstances there was any obligation to have a hypothetical division in view of what might possibly happen. I am of opinion, both on the special grounds of this case and upon the construction of the Valuation (Metropolis) Act, 1869, that the appellants had a right of appeal against the rate. The result is that this appeal must be allowed.

DARLING J. I agree.

CHANNELL J. I entirely agree with what my Lord has said, but I think that I ought to add that in my view, so far as any future hereditaments are concerned—that is, if a new dock is made in Woolwich—it is intended that the general law shall apply to those hereditaments. I understand the meaning and

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intention of s. 10, sub-s. 1, of the London Government Act, 1899, and of the scheme made under that Act, to be to prevent the particular persons in Woolwich, who were the owners or occupiers of hereditaments to which the exemption applied, from being rated any higher in the future. It is for that reason that I do not think that our present decision that the partial exemption of these appellants' premises continues is in any way contradictory to the express enactment, in s. 19, sub-s. 1, that Woolwich should be placed under the general law applying to metropolitan boroughs. I think that Woolwich is placed under the general law applicable to the metropolis with regard to the future, and that if any new dock is made it will come under that general law.

LORD ALVERSTONE C.J. The point raised by my brother Channell as to future hereditaments had not occurred to me. I do not express any opinion differing from his, but I should like to hear that point argued, for it does not arise in this case.

Appeal allowed.

Solicitors for appellants: *Turner, Son & Foley.*
Solicitor for respondents: *Arthur B. Bryceson.*

J. F. C.

MONK *v.* ARNOLD.

1902
March 3.

County Court—Jurisdiction—Landlord and Tenant—Factory—Expense of complying with Requirement of Sanitary Authority—Factory and Workshop Act, 1891 (54 & 55 *Vict. c.* 75), *s.* 7.

Where the lessor of a factory sues the lessee in the county court, on a covenant by the lessee to pay all charges and outgoings which may be charged or imposed on the lessor in respect of the premises, to recover the expenses to which he has been put in complying with the requirements of the sanitary authority under s. 7 of the Factory and Workshop Act, 1891, the county court judge has jurisdiction, whatever may be the legal effect and construction of the covenant, to make such order apportioning the expense between the parties as may seem just and equitable to him under all the circumstances of the case.

CROSS-APPEALS from the decision of the Clerkenwell County Court.

The plaintiff was the statutory owner within the meaning of the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), of premises in the Holloway Road, Islington, which by a lease dated November 18, 1897, he had let to the defendant, to be used as a factory, for a term of fourteen years from December 27, 1896, at a rent of 200*l.* per annum. By the lease the defendant covenanted (inter alia) "from time to time and at all times during the said term to pay and discharge all rates, taxes, charges, and assessments and outgoings whatsoever whether parliamentary, parochial, local, or of any other description which now are or may at any time hereafter be assessed, charged, or imposed upon the demised premises or the landlord or occupier in respect thereof (the landlord's property tax only excepted) . . . . and from time to time and at all times during the said term well and substantially to repair, cleanse, maintain, amend, and keep the demised premises and all additions or additional buildings . . . . with all necessary reparations, cleansings, and amendments whatsoever, original structural defects in the building of the premises excepted. . . . ."

On June 14, 1899, the London County Council, acting as the sanitary authority for the district, gave notice to the

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plaintiff under s. 7, sub-s. 2, of the Factory and Workshop Act, 1891, specifying the measures necessary for providing means of escape in case of fire for the persons employed in the factory, and requiring him to carry out the same. The plaintiff accordingly executed the works at a cost of 368*l.* 17*s.* 6*d.*, and brought an action in the county court to recover that sum from the defendant under the covenant in the lease. It was admitted at the trial that the premises were a factory within the Act, that the work done was reasonably necessary, and that its cost was reasonable.

The county court judge held on the true construction of the covenant that there was no legal liability upon the defendant to pay the whole of the expenses to the plaintiff, but he thought that he had jurisdiction under s. 7, sub-s. 2, of the Factory and Workshop Act, 1891 (1), notwithstanding the covenant, to divide the expense of carrying out the requirements of the sanitary authority fairly and equitably between the owner and the occupier, and he accordingly ordered the defendant to pay the plaintiff the sum of 200*l.*

From this decision both parties appealed.

C. A. Russell, K.C. (*Bonner* with him), for the defendant. According to the proper construction of the covenant, and

(1) By the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7, sub-s. 2, "With respect to all factories . . . . in which more than forty persons are employed, it shall be the duty of the sanitary authority of every district, ... to ascertain whether all such factories within their district are provided with such means of escape as aforesaid, and, in the case of any factory which is not so provided, to serve on the person being within the meaning of the Public Health Act, 1875 the owner of the factory, a notice in writing specifying the measures necessary for providing such means of escape as aforesaid, and requiring him to carry out the same before a specified date, and thereupon such owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements . . . . If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court having jurisdiction where the factory is situate, and thereupon the county court, after hearing the occupier, may make such order as appears to the court just and equitable under all the circumstances of the case."

having regard to the authorities, the tenant is not legally liable to repay to the landlord the sum which he has expended in carrying out the requirements of the sanitary authority. (1) The county court judge had no jurisdiction, therefore, to make the order. His jurisdiction only arises in cases where the occupier "ought," that is to say, "is legally liable," to bear or contribute to the expense incurred by the owner. The effect of the section is to make the owner primarily liable for that cost, and it is only in cases where there is a legal liability on the occupier to pay or contribute to the cost of the expenses that the county court has power to make such an order as may be just and equitable under all the circumstances of the case: *Arding* v. *Economic Printing and Publishing Co.* (2) To hold otherwise would be to create the anomaly that if the owner sued on the covenant in the High Court there would be no jurisdiction for that Court to make such an order, as it can only be exercised in the county court.

Dickens, K.C. (*Chester Jones* with him), for the plaintiff. On the proper construction of the covenant and the authorities the tenant is liable to pay the expense incurred by the landlord. That being so, the county court judge had no jurisdiction to apportion the amount between the plaintiff and defendant, but was bound to give effect to the language of the covenant. His jurisdiction under the section to make such order as may appear to him just and equitable under all the circumstances of the case only arises where the legal liability of the tenant is not established.

LORD ALVERSTONE C.J. (3) We have to give judgment in these cross-appeals. The real point raised by the case is as to

(1) The arguments on this point are omitted, as they turned on the construction of the particular covenant and on the application to it of the decision in *Foulger* v. *Arding*, [1901] 2 K. B. 151, which has since been reversed by the Court of Appeal: see p. 700 above.

(2) (1898) 79 L. T. 420, 622.

(3) The Court gave judgment first on the construction of the covenant, holding that the county court judge was right, and that it did not impose any legal liability on the defendant to pay the whole of the expenses incurred by the plaintiff. This judgment for reasons above stated is not reported.

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the meaning and object of s. 7 of the Factory Act, 1891. That Act has nothing to do with landlord and tenant, but the object of this section was to protect the employees at factories from fire. Sub-s. 1 of s. 7 provides that every factory erected after a certain date in which more than forty persons are employed is to be furnished with a certificate from the sanitary authority of the district that it is provided with such means of escape in case of fire as can be reasonably required, and, by sub-s. 2, where a factory is not so provided, the sanitary authority is to serve on the owner of the factory a notice in writing specifying the measures necessary for providing such means of escape, and requiring him to carry out the same before a specified date; and thereupon such owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements, under certain penalties. Then the sub-section goes on: "If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court having jurisdiction where the factory is situate, and thereupon the county court, after hearing the occupier, may make such order as appears to the court just and equitable under all the circumstances of the case."

The principal object of the section is, as I have said, that of making the factory safe in regard to the persons who are within it, and, that being the object of the legislation, the Legislature did not care or did not stop to consider on whom the liability for carrying out the requirements of the sanitary authority might fall. Accordingly the section provides that the owner of the factory is to be the person responsible. That being so, it seems to have been foreseen that it might be necessary to deal with the question of liability in the very common case of property being let on lease as a factory. It is obvious that where it is necessary to make structural alterations it might be just to impose the whole expense on the tenant if there was a long term to run, or none if there was only a very short period unexpired; whatever might be the terms of the covenant as to outgoings. Therefore the section, having provided that the tenant was to have nothing to do with the primary

obligation, goes on to enact the words that I have just read. Upon those words two contentions arise. Both counsel for the plaintiff and counsel for the defendant have argued that the word "ought" in the section is equivalent to and must be construed as "is liable in law to," and Mr. Russell contends that, as in this case the tenant was not bound to contribute, the county court judge ought not to have ordered him to pay anything. Mr. Dickens, on the other hand, contends that the county court judge had no jurisdiction to divide the amount, but that he ought to have made the tenant pay the whole amount incurred. In my opinion, the view taken by the county court judge was right. If the Legislature had intended that only questions arising out of the covenant between the landlord and the tenant should be discussed, it would have used different language. But, bearing in mind all the cases which might arise, it is obviously just and right that the county court judge should have an equitable jurisdiction to determine how the amount which has been expended shall be apportioned. He is bound, I think, to take into consideration the contract between the parties, but unless its terms are such as to make it unjust and inequitable that he should divide the amount between them, I think he has jurisdiction to do so.

Mr. Russell contends that this interpretation of the section cannot be right, because the landlord may sue in the High Court on the covenant of the tenant to pay all outgoings, and as the jurisdiction given by this section can only be exercised in the county court, and can only be invoked by the owner, such a construction would work injustice to the tenant. That is, no doubt, a difficult point. It may be that it is a casus omissus; but I think it is impossible not to give their natural meaning to the plain words of the section. I think, therefore, that the plaintiff's appeal fails, and that the county court judge was right in the view he took. On the cross-appeal, I will only say that I think it is impossible to contend that the covenant in question imposed a plain obligation on the tenant, and, therefore, it seems to me that it is certainly a case in which the county court judge had jurisdiction to make the order in question; but I think we must go further, and

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hold that even if we were satisfied that in an action in this Court the landlord could have sustained his claim on the terms of the covenant, yet that the arbitration of the county court judge is intended to deal with the case of the owner alleging that the occupier is bound to bear the expense of complying with the requirement.

I think, therefore, that the decision of the county court judge was right, and must be affirmed.

DARLING J. I am of the same opinion. It seems to me that the words used in this section were not merely intended to enable the county court judge to decide the question according to the strict legal rights of the parties, which is the ordinary duty of every judge. I think it is clear that where cases like the one we are now considering might arise the Legislature knew that any order based on the strict rights of the parties under their contract might bear hardly on the one or the other. The Legislature were engaged in remedial legislation, and they seem to have thought that in such a case the county court judge ought to have jurisdiction to do something more than make an order which would be according to the strict legal rights of the parties, but that he should have regard in any order he might make to the whole justice and equity of the case. They intended in fact that he should do something more than justice in the ordinary acceptation of the term—he is to do justice having regard to the whole of the circumstances of the case. That, it seems to me, is what the Legislature intended that the county court judge should do; and that, I think, is what he has done in this case.

CHANNELL J. I agree as to the construction of the section. The Legislature, seeing that it would be difficult to say whether such an obligation as this ought to be imposed on the landlord or the tenant of the factory, and seeing that that question would commonly depend on the circumstances of each particular tenancy, deliberately refrained in this section from imposing the liability finally upon the landlord. They put the liability on the landlord in the first instance because it was

easiest and best in the public interest to make him primarily responsible, but they gave the county court judge power to say how the liability should ultimately fall, and for that purpose they gave him, as I think, power over the contract which had been entered into between the landlord and the tenant. If the parties had by express terms provided for expenses under this section of the Factory Act, so that, by that contract the liability for those expenses fell clearly on either the landlord or the tenant, then I do not think it would be just or equitable for the county court judge to make any other order; but if that liability would only fall on either of them by reason of some general expression in the covenant, sufficient possibly to include such expenses as these if the statute had absolutely imposed them on the landlord, but not clearly shewing that the parties had really contemplated the case and intended that one or other of them should bear these expenses, whether incurred at the beginning or end of the term, then I think that would be precisely the case in which the county court judge ought to make such order as might seem to him just and equitable in all the circumstances of the case. It was suggested in the argument that this construction involved the difficulty that a landlord suing on the covenant in the superior Court could not avail himself of this section, which applies only to the county court. I think very probably the point was overlooked by the Legislature; but it seems to me that there is a way out of the difficulty, or, rather, that it does not really arise. There is, I think, no imposition or obligatory outgoing on the landlord until the county court judge has decided that he is responsible, and, therefore, if he were to sue the tenant on the covenant in the superior Court, he would be met by the objection that there was no outgoing for which the tenant could be liable on the covenant until the county court judge had so held. The section only charges the owner in the first instance, and it needs, as it seems to me, the decision of the county court judge to make the expense a real charge on the landlord for which he could sue under the covenant. That seems to me a way out of the difficulty which has been suggested; but even if it is not, that difficulty is not sufficient to

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make me doubt that the construction we are putting on the section—namely, that the county court judge has a jurisdiction to apportion the amount—is the right one.

Appeals dismissed.

Solicitors for plaintiff: *Stanley Evans & Co.*
Solicitors for defendant: *Shaen & Roscoe.*

A. P. P. K.

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March 5.

MOORE, APPELLANT *v.* KEYTE, RESPONDENT.

Vaccination—Proceedings to enforce Law—Power of Vaccination Officer to take Proceedings without Authority of and against the Desire of Guardians—Vaccination Acts, 1867 *to* 1898 (30 *&* 31 *Vict. c.* 84; 34 *&* 35 *Vict. c.* 98; 37 *&* 38 *Vict. c.* 75; 61 *&* 62 *Vict. c.* 49)—*General Order of Local Government Board, October* 18, 1898, *arts.* 26, 27.

A vaccination officer by virtue of his appointment, without directions, general or special, from the guardians, and notwithstanding the guardians' directions not to prosecute, may institute proceedings for the enforcement of the law against a parent who is in default in respect to the vaccination of his child.

In such proceedings it is not a condition precedent that proof should be given by the vaccination officer of the visit of the public vaccinator to the home of the child after twenty-four hours' notice to the parent, as required by s. 1, sub-s. 3, of the Vaccination Act, 1898.

CASE stated by justices under the Summary Jurisdiction Acts.

An information was preferred on October 8, 1901, by the respondent, who was the vaccination officer appointed by the guardians of the parish of Leicester, against the appellant, for that he, being the parent of a certain child residing in the said parish, had unlawfully neglected to cause the said child to be vaccinated within six months of its birth.

At the hearing of the information the appointment of the respondent as vaccination officer on December 22, 1899, and the sanctioning of the appointment by the Local Government Board, was proved. The following resolution from the minute-

book of the guardians passed by them at a meeting on April 30, 1901, was put in evidence :—

" That the board strongly condemns the action of the vaccination officer in prosecuting defaulters under the Vaccination Acts and incurring law expenses without consulting the guardians, and instructs him in future to report defaulters to the board, so as to afford them an opportunity to offer a reasonable excuse, as provided by s. 29 of the Vaccination Act, 1867. The guardians also point out to the vaccination officer that he is appointed (inter alia) subject to s. 5 of the Vaccination Act, 1871, to enforce the provisions of the Vaccination Acts, 1867 to 1898, and to prosecute such persons as are charged as defaulters under the said Acts, and the guardians will specially authorize him in writing under their common seal to prosecute such defaulters as they desire to be prosecuted; and that a copy of this resolution, signed by the chairman and sealed with the common seal of the board, be forwarded to the vaccination officer."

Pursuant to this resolution, the respondent on June 4, 1901, submitted a list of twelve persons, and on October 1 a list of ten persons, included in which was the name of the appellant; and the guardians on June 4 and October 1 respectively passed the following resolution: " That the vaccination officer be and hereby is instructed to take no further steps instituting proceedings against those persons whose names are included in the list submitted to the guardians to-day until he receives the instructions of the guardians to do so." Copies of these resolutions were sent to the respondent, and there had been no resolution requiring him to take proceedings against the appellant or generally.

The respondent admitted that he was aware of these resolutions, and that he had taken these proceedings notwithstanding them as vaccination officer of the parish, and he contended that his appointment in this capacity gave him impliedly power to enforce the Vaccination Acts and to take these proceedings without the authority or direction of the guardians.

The respondent proved the age of the child, and that there had been no certificate of excuse or of successful vaccination in

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respect of it. He stated that he had not seen the child, but that he had seen the appellant in regard to it. It was contended for the appellant that it was a condition precedent to a prosecution that the public vaccinator should have visited the appellant's house for the purpose of vaccinating the child in accordance with s. 1, sub-s. 3, of the Vaccination Act, 1898, and that he should previously have served notice of his intention so to do.

The justices convicted the appellant, but stated this case for the opinion of the Court on the questions—

(1.) Whether the respondent by virtue of his appointment as vaccination officer, without directions, general or special, from the guardians at any time, and notwithstanding the guardians' directions not to prosecute in certain specified cases, could institute these proceedings against the appellant.

(2.) Whether it was a condition precedent to a prosecution by the vaccination officer under s. 29 of the Vaccination Act, 1867, that due proof should be given of the service on the parent of the child by the public vaccinator of the notice mentioned in the Vaccination Acts, 1867 to 1898, and of his having visited the house of the child as therein directed.

Rawlinson, K.C. (*Schultess Young* with him), for the appellant. By s. 1, sub-s. 3, of the Vaccination Act, 1898 (61 & 62 Vict. c. 49), if a child is not vaccinated within four months after its birth the public vaccinator of the district, after twenty-four hours' notice to the parent, is to visit the child's home and offer to vaccinate it. That visit and notice, therefore, is a condition precedent to any prosecution, and must be proved before there can be a conviction. This is shewn by s. 5 of Form A of Sched. V. to the General Order under the Vaccination Acts, 1867 to 1898, made October 18, 1898. It is a necessary preliminary to any prosecution.

Secondly, the prosecution is under s. 29 of the Vaccination Act, 1867 (30 & 31 Vict. c. 84), which provides that every parent who shall neglect to procure the vaccination of a child, "and shall not render a reasonable excuse for his neglect," shall be guilty of an offence. It is plain from ss. 27 and 28 of

the Act that the guardians are the persons to whom the reasonable excuse is to be rendered, since they are the persons whose duty it is to make inquiries into all the circumstances. No doubt by the Vaccination Act, 1871 (34 & 35 Vict. c. 98), vaccination officers were created, and the powers given to registrars by the Act of 1867 were transferred to them; but there was nothing which gave the vaccination officer power to override the decision of the guardians, and if they decide not to prosecute in any case he has no jurisdiction to go on with the proceedings. By s. 17 of the General Vaccination Order, 1874, power was given to the Local Government Board to require a vaccination officer to take proceedings, but that order has been rescinded and the Order of 1898, which takes its place, contains no such provision. The Legislature evidently deliberately decided to trust the local authority with the control and initiation of such prosecutions. That some authority of the guardians, or, at any rate, their consent, was necessary to a prosecution is plain from *Robinson* v. *Lowe* (1) and *Bramble* v. *Lowe* (2), in both of which cases the prosecution was under s. 31 of the Act of 1867, and not under s. 29, so that they have no direct application. A vaccination officer is the officer of the guardians, and he is bound to obey their reasonable orders. He is not an independent public officer, and still less is he the officer of the Local Government Board.

The Attorney-General (*Sir R. B. Finlay, K.C.*), (*H. Sutton* with him), for the Local Government Board, obtained leave to intervene. The matter is one of public importance, and the Local Government Board are desirous of being heard in the matter. As to the first point, it is impossible to contend on the construction of s. 1, sub-s. 3, of the Act of 1898 that the giving of notice and the visit of the public vaccinator are necessary preliminaries to any prosecution under s. 29 of the Act of 1867. The absence of such notice and visit may be a ground of defence, but it cannot be necessary that proof of them should be given on the part of the prosecution.

As to the second point, the question that the Court have to

(1) (1896) 13 Times L. R. 19. (2) [1897] 1 Q. B. 283.

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decide is whether the respondent as vaccination officer had power to institute these proceedings without any direction from the guardians and without their consent. The only section which required the guardians to make inquiries was s. 27 of the Act of 1867, which has been repealed. The reasonable excuse spoken of in s. 29 must be rendered, not to the guardians, but to the Court. It is plain here, however, that no inquiries were made and no excuses rendered, because the resolution of the guardians not to prosecute was in each case passed on the very day on which the list forwarded by the vaccination officer was received. *Bramble* v. *Lowe* (1) shews that the vaccination officer may proceed under s. 31 without any special authorization from the guardians, and it would be extraordinary if he could not also do so under s. 29. By the General Vaccination Order of October, 1898, which has now the force and effect of a statute, art. 26, every vaccination officer has to observe the instructions contained in the 4th schedule to the order. Among those instructions is 6 (*d*): "If the vaccination officer has not received in respect of any child a certificate under s. 2 of the Vaccination Act, 1898, within the time limited by that section, and at the end of seven days after the expiration of six calendar months from the birth of the child has not received any other of the certificates mentioned in sub-division (*a*) of this paragraph, the vaccination officer shall forthwith give a notice in the Form K, set out in the fifth schedule to this order . . . . to the parent . . . . If that notice is not duly complied with within the time specified therein it will become the duty of the vaccination officer under the Vaccination Act, 1871, to take proceedings for the enforcement of the law." Form K, after informing the parent that he is in default and requiring him to have the child vaccinated, goes on: "failing which it will be my duty to take the proper steps for securing the enforcement of the law." It is plain from this that the initiation of such proceedings rests with the vaccination officer, and although by art. 27 of the order he is to give all information to the guardians as to any legal

(1) [1897] 1 Q. B. 283.

proceedings taken by him as vaccination officer, and to obey all lawful orders of the guardians which are applicable to his office, the article expressly limits this obedience by the words, "subject to the provisions of the Vaccination Acts, 1867 to 1898, and of this order." [He referred to *Knight* v. *Halliwell.* (1)]

Parfitt, for the respondent, was not called upon to argue.

Rawlinson, K.C., replied.

LORD ALVERSTONE C.J. The points raised in this case are, no doubt, questions of great public importance, and it was for that reason, and that reason only, that we thought it right to hear the Attorney-General, in order to see that we had before us all the material on which the judgment should be formed.

The first point taken was that in every prosecution under s. 29 of the Act of 1867 the prosecution must prove the notice and the domiciliary visit of the public vaccinator before the case can be entertained. That depends upon some sections which I think make the matter abundantly clear. Sect. 16 of the Act of 1867 now stands in these terms: "The parent of every child born in England shall, or where by reason of the death, illness, absence or inability of the parent or other cause any other person shall have the custody of such child, such person shall, cause it to be vaccinated by some medical practitioner." The reason for the omission from the section of all the other words, to which I need not further refer, is because by s. 1 of the Act of 1898 provision is made, not that the child shall be taken to the vaccination officer, but by a new provision, as I think one of the greatest amendments of the Vaccination Acts, it is enacted that the medical man must visit the home of the parent of the child, it being the duty of the parent to cause the child to be vaccinated. Sect. 29, under which the prosecution was launched, is in these terms, as amended by the Act of 1898: "Every parent or person having the custody of a child who shall neglect to cause it to be vaccinated, or after vaccination to be inspected, and shall not render a reasonable excuse for his neglect, shall be guilty of an offence."

(1) (1874) L. R. 9 Q. B. 412.

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Now, it seems to us absolutely plain that when the magistrates have the case before them they must consider, upon the question whether there is a reasonable excuse shewn, whether there has or has not been a visit by the public vaccinator; but, assuming no such point is raised, it would be involving the parties in a useless and unnecessary expense if there should be required to be formal proof in every prosecution of those conditions, without which, of course, one cannot reasonably imagine that any prosecution would be commenced.

The statute imposes upon the public vaccinator the duty of going to the home of the child, and imposes on the parent the duty of causing his child to be vaccinated; and we are of opinion that it is not necessary to give this formal proof in every case, though upon the question of reasonable excuse it may be very material to consider whether there has or has not been a visit.

The next question, though it does not present any greater difficulty, is of some importance, but I may say, speaking for myself, that I answer this question because we have been asked to answer it. It is a point of law which has been argued before us, but I cannot conceive how it can possibly be contended that such a condition is essential to a prosecution under s. 29 of the Act of 1867. Sect. 29 says that every parent or person having the custody of a child who does not cause the child to be vaccinated shall be guilty of an offence unless he shews a reasonable excuse. Now, the real point which arises with regard to a prosecution, apart from the question which is stated to us, is whether it is necessary to shew that the guardians have authorized a prosecution before the magistrates can entertain it. I am of opinion that there is nothing of the kind necessary. My brother Channell referred in the course of the argument to cases in Lunacy, and there are other cases where the fiat of the Attorney-General has to be obtained, as in the case of criminal proceedings against trustees, and in those cases the fiat of the Attorney-General has to be proved on the part of the prosecution. There is, however, no ground for saying that the consent of the guardians is on the face of the statute, or on the ground of any consideration

involved in the statute, made a condition precedent to this prosecution.

But the case goes further, and we are asked to say whether the vaccination officer, by virtue of his appointment as such, without directions, general or special, from the guardians at any time, and notwithstanding the guardians' direction not to prosecute in certain specified cases, can institute proceedings under the Vaccination Acts, 1867 to 1898, as vaccination officer of the guardians. Now we are not dealing with any question between the guardians and the officer as to any question of expense he has incurred; we are dealing only with the question of what are the public duties of a vaccination officer.

We have again to go back and see the scheme of the Legislature. Sect. 16 of the Act of 1867 I have already read. The parent is to cause the child to be vaccinated. Sect. 29 creates the offence. Sect. 31 was a section which gave an alternative method of getting the child vaccinated, which was a duty undoubtedly imposed originally upon the registrar, or an officer appointed by the guardians, and which subsequently by the Act of 1871 was imposed upon the vaccination officer. Now, in my judgment, having regard to the provisions of the Act and the duty which the vaccination officer has to perform, the vaccination officer has the duty of taking proceedings. I should have come to this conclusion quite independently of the order; but, I think most properly, the Order of 1898 makes the matter, if I may use the expression, more abundantly clear. It is not as if this kind of order was passed for the first time. From the year 1874, when the Vaccination Act (37 & 38 Vict. c. 75) removed any doubt as to the powers of the Local Government Board in this respect, orders have been made. For the purposes of to-day, I think the Attorney-General is right in saying that the Order of 1898 is in the position of a statute. There were in the Order of 1874 arts. 16 and 17, which were under consideration in the case of *Bramble* v. *Lowe* (1), where my brother Wright expressed the opinion that for the purpose of s. 31 (I agree for that purpose only), notwithstanding the provisions of the then existing orders as to

(1) [1897] 1 Q. B. 283.

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the power of the guardians to direct prosecutions, the vaccination officer had the duty to proceed. That is not a decision upon the section that we are now considering, but it is a decision upon an analogous matter.

I need not read the provisions of the Order of 1898; but there is a positive direction in art. 26 that the instructions contained in the 4th schedule are to be obeyed by the vaccination officer. Those instructions provide (6 (*d*)) that the vaccination officer shall give a certain notice in Form K in the 5th schedule, and if it is not complied with it will become the duty of the vaccination officer under the Vaccination Act of 1871 to take proceedings for the enforcement of the law. Form K (which he is directed to serve) tells the person in default that failing the vaccination of the child it will be the duty of the vaccination officer to take the proper steps for securing the enforcement of the law.

Now, in my opinion, having regard to the previous legislation and the previous orders and the powers of the Acts of 1867 and 1871, that order cannot be said to be ultra vires. Mr. Rawlinson does not go as far as saying that it is ultra vires; but he contends that if the vaccination officer affects to take proceedings which are either generally prohibited or specially prohibited by the guardians he is bound in that respect to follow the instructions of the guardians. I think he is bound to obey the orders of the Local Government Board, and that in accordance therewith it is the duty of the vaccination officer as such to take these proceedings. It is contended that we ought to assume in this case that there was a bonâ fide investigation by the guardians into each of these cases, and that they thought there ought not to be a prosecution upon the merits. I cannot come to that conclusion, but I do not wish to be thought to base my judgment on any such narrow ground. I base my judgment on the ground that it is the duty of the vaccination officer under these statutes and orders to see that their provisions are observed, and I answer the question, therefore, in the way I have said, not because it could be alleged to be a condition precedent to the prosecution being entertained, but because we have been asked to express an opinion on the point

before us; and I am therefore of opinion that the appeal should be dismissed with costs.

DARLING J. I am of the same opinion. On the first point raised, whether it was necessary to prove that the vaccination officer had attended at the home of the child, I do not desire to say anything. On the other point the question that we are asked is this—whether the vaccination officer can legally prosecute for breaches of the law if ordered by the guardians not to do so, and so ordered by them for no reason given. In effect, and in the circumstances of this particular case, that question is whether guardians who have been compelled by mandamus to appoint an officer to enforce the vaccination laws can obey the law by appointing a vaccination officer, paying his salary, and then ordering him never to prosecute any one unless he has their sealed order to do so, and then never issuing any sealed order, nor, so far as I can see, ever intending to issue one. To act in such a way as these guardians shew that they intend to act is simply to claim a right to reduce the vaccination laws to an absolute nullity. They pass a resolution in which they condemn the vaccination officer for prosecuting defaulters. The public vaccinator brings up a list of ten defaulters, and another list of twelve defaulters. The guardians pass a resolution that he is hereby instructed to take no further steps instituting proceedings against those persons until he receives instructions from the guardians to do so. I think it is plain that they had not investigated the cases, and that they do not intend to issue instructions and they set out in their resolution that the guardians will specially authorize the vaccination officer in writing under their common seal to prosecute such defaulters, not as have broken the law, but—the words they use are very significant—"as they desire to be prosecuted."

I cannot believe that that is what Parliament intended. I think the argument put before us by the Attorney-General really was not necessary; but it made the matter so plain that it was to the public advantage that it should be put forward, and I agree in the judgment and in the language in which it has been expressed by my Lord.

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CHANNELL J. I agree, and I do not think it is necessary to add anything to my Lord's judgment.

Solicitors for appellant: *Crowders, Vizard & Oldham, for Owston, Dickinson & Simpson, Leicester.*

Solicitors for respondent: *Leonard & Pilditch, for Fowler & Fowler, Leicester.*

Solicitors for Local Government Board: *Sharpe, Parker, Pritchard, Barham & Lawford.*

A. P. P. K.

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March 12, 13.

[IN THE COURT OF APPEAL.]

HARBURG INDIA RUBBER COMB COMPANY *v.* MARTIN.

Guarantee—Indemnity—Oral "Promise to answer for the Debt of another"—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

The defendant, who was a director of and had a large interest as a shareholder in a company, which he had also financed, orally promised the plaintiffs, who were judgment creditors of the company, and who had delivered to the sheriff a writ of fi. fa. which they had issued upon their judgment, on which the sheriff had failed to levy because he could not effect an entry, that he (the defendant) would indorse bills for the amount of the debt:—

Held, that this promise was not a contract of indemnity, but was a "promise to answer for the debt of another" within s. 4 of the Statute of Frauds, and that, as it was not in writing, an action for the breach of it could not be maintained:

Held, also, that the case was not excepted from s. 4 by reason of the interest which the defendant had as a shareholder and otherwise in freeing the goods of the company from the execution, he having no legal interest in or charge upon the goods.

The authorities which have established exceptions from s. 4 considered.

Decision of Mathew J. reversed.

APPEAL from a decision of Mathew J.

The plaintiffs, a foreign company carrying on business in Germany, were judgment creditors of an English company called the Crowdus Accumulator Syndicate, Limited, of which the defendant was a director and in which he held a large number of shares. He had also financed the syndicate.

The plaintiffs had issued a writ of fi. fa. upon the judgment, which the sheriff had failed to execute, because he could not effect an entry. The defendant then had an interview with a Mr. Winter, the plaintiffs' agent in England, at which he verbally promised Winter that he would indorse two bills of exchange, each for half the amount of the debt, and payable respectively at three and six months. On the faith of this promise Winter withdrew the writ. The action was brought for breach of the defendant's promise.

At the trial Mathew J. gave judgment for the plaintiffs, holding that s. 4 of the Statute of Frauds did not apply.

In the course of his judgment the learned judge said: "What is the result of the evidence? At the time when the defendant came to Mr. Winter the plaintiffs were in a position to take possession of the goods of the syndicate; they were in a position analogous to that of persons having possession of the goods, and their legal position is recognised in *Williams* v. *Leper* (1) and in *Edwards* v. *Kelly*. (2) Those cases have been discussed with approval, and very sensible and reasonable cases they are, and in their facts they closely approach the present case. They are discussed in the notes to *Forth* v. *Stanton*. (3) What was the object of the arrangement here? The object was to protect the goods of the syndicate; it was not to pay the debt of another. It is pretty clear that what the defendant suggested was that he should have time to sell all which belonged to the company. If, in fact, the object of the contract was to protect the goods, that would be sufficient to take the case out of the statute.

"But there is another point still more clearly in favour of the plaintiffs, namely, that the promise was given for the purpose of obtaining a direct personal advantage for the defendant himself. He had invested a large sum in the syndicate, and would lose every farthing of it unless time were given for the syndicate to get on its legs. With that object—and I should gather it was the sole object he had in view—he made

(1) (1766) 3 Burr. 1887. (2) (1817) 6 M. & S. 204; 18 R. R. 349.
(3) 1 Williams' Saund. 209 a.

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the promise. That again is a ground for saying that the case is not within the Statute of Frauds, as is clear from *Sutton & Co.* v. *Grey*. (1)

"Under these circumstances it seems to me clear that the Statute of Frauds does not apply, and my judgment must be for the plaintiffs."

The defendant appealed.

English Harrison, K.C., and *R. F. Colam*, for the appellant. This transaction was in effect a promise by the defendant "to answer for the debt of another person" within s. 4 of the Statute of Frauds, and there is no memorandum or note thereof in writing and signed by him. Therefore the decision of Mathew J. was wrong, and the plaintiffs are not entitled to recover, even assuming that the verdict was right and an agreement had been made. The learned judge relied on authorities which shew that the statute does not apply where there is an original promise founded on a new consideration. There is nothing of that sort in the present case. In *Williams* v. *Leper* (2) the substance of the case was that, in consideration of the landlord's not taking the goods of the tenant out of the possession of the broker, the latter promised to pay the rent out of the proceeds of sale. Here the goods did not belong to the defendant. He was a shareholder, but the goods belonged to the syndicate or their debenture-holders. There was no fund out of which the plaintiffs had a right to be paid. The defendant did not offer to sell the goods and account for the proceeds.

In *Edwards* v. *Kelly* (3) the goods were actually distrained, and were only given up again upon trust for the sale of a sufficient amount of them to satisfy the demand. It is not suggested in the present case that the defendant offered to do anything of that kind. Mathew J. has held on the authority of *Sutton & Co.* v. *Grey* (1), following *Couturier* v. *Hastie* (4), that s. 4 does not apply, because the defendant had himself

(1) [1894] 1 Q. B. 285.
(2) 3 Burr. 1887.
(3) 6 M. & S. 204; 18 R. R. 349.
(4) (1852) 8 Ex. 40.

an interest in the transaction. But he was under no liability apart from the promise he is alleged to have made. "Interest" means a legal interest in the goods on his own behalf, not as a member of the syndicate to which they belonged. The defendant was not a debenture-holder, and he had no legal or equitable interest in the goods.

The plaintiffs' right of action does not arise from the fact that the defendant indorsed the bills, but from the alleged contract, and that can only be proved by a memorandum in writing under the statute: *Steele* v. *M'Kinlay* (1); *Jenkins & Sons* v. *Coomber*. (2)

C. A. Russell, K.C., and *W. Wills*, for the plaintiffs. The decision is right and should be affirmed. It is not contended that the syndicate is not a separate entity and capable of being "another person" within s. 4. But when the object of the transaction is not to answer for the debt of another person, but to obtain a security and an independent advantage for one's own purposes, there need not be a memorandum in writing. In this case, if the execution had been allowed to proceed, the syndicate would have been ruined, and the appellant would have lost his money. Winter had a right to enforce the judgment, and this transaction was a contract of indemnity by the defendant. It was not a guarantee of a past debt. Stopping the execution might result in loss to the plaintiffs, and they would not have stopped it unless they were properly protected. That the measure of damages would be the amount of the debt from the syndicate is immaterial. If the appellant's object was to protect his own property, the authorities shew that a writing was not necessary. In all the cases in which it has been held that the statute applied, something was done which resulted in the discharge of the debt of another. The distinction between a guarantee within the statute and a contract of indemnity is well known, and is shewn by *Williams* v. *Leper* (3) and *Bampton* v. *Paulin*. (4) The plaintiffs were induced to give up their rights on the faith of the promise by the appellant to indemnify

(1) (1880) 5 App. Cas. 754.
(2) [1898] 2 Q. B. 168.
(3) 3 Burr. 1887.
(4) (1827) 4 Bing. 264.

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them: *Walker* v. *Taylor* (1); *Castling* v. *Aubert* (2); *Fitzgerald* v. *Dressler*. (3)

[VAUGHAN WILLIAMS L.J. In all those cases the person who made the promise had personally or through an agent an interest in the property liberated by his promise.]

The judgment of Bowen L.J. at the trial of the action in *Sutton & Co.* v. *Grey* (4) shews that that learned judge laid stress upon the object of the defendant in giving the promise, and said that in that case the object of the contract was "that the defendant should introduce responsible persons to the plaintiffs, and the contract included a guarantee that he would indemnify the firm against his not doing so .... the defendant's liability to answer for the debt of another is only an ulterior consequence of the terms in which the contract is framed." Bowen L.J. held that the contract was therefore not a promise "to answer for the debt of another" within s. 4, and that the case was governed by *Couturier* v. *Hastie*. (5) This exactly applies to the present case. The defendant's object in making the promise was to liberate the goods of the syndicate, and thus to protect his own interest as a shareholder. The contract was one of indemnity, not a promise to answer for the debt of another. The defendant was primarily seeking his own advantage, and the payment of the debt of the syndicate was merely incidental to that: *Sutton & Co.* v. *Grey* (6); *Guild & Co.* v. *Conrad*. (7) As Lord Esher M.R. said in the former of those cases (8), the defendant had "an interest in the transactions." The syndicate were not in such a position that it must have been supposed impossible for them to pay the debt. The bargain was that the plaintiffs should have the personal liability of the defendant upon the bills. If the defendant had indorsed the bills, the plaintiffs could have sued him under s. 56 of the Bills of Exchange Act, 1882. If the bills had been drawn to the order of the plaintiffs, and they had indorsed them to the defendant, and he had reindorsed them and handed them back to the

(1) (1834) 6 C. & P. 752.
(2) (1802) 2 East, 325.
(3) (1859) 7 C. B. (N.S.) 374.
(4) (1893) 69 L. T. (N.S.) 354.
(5) 8 Ex. 40.
(6) [1894] 1 Q. B. 285.
(7) [1894] 2 Q. B. 885.
(8) [1894] 1 Q. B. at p. 287.

plaintiffs, they could have sued him as indorser: *Wilkinson & Co.* v. *Unwin.* (1)

VAUGHAN WILLIAMS L.J. The material facts of this case are very short. The plaintiffs had supplied goods to a company called the Crowdus Accumulator Syndicate. The syndicate did not pay what was due from them for the goods, and the plaintiffs recovered judgment against them, and placed a writ of fi. fa. in the hands of the sheriff to realize the amount of their judgment. The sheriff found that the works of the syndicate had been stopped and their place of business closed, and he did not take possession. After this there was a meeting between the defendant and Mr. Winter, the plaintiffs' agent. A conversation took place at that meeting, and the jury have found that Mr. Winter's account of it is accurate. To put the result of the conversation shortly, the defendant then verbally promised Mr. Winter that he would indorse some bills for the amount of the judgment debt. It is said that amounted to an oral promise to give a guarantee of the judgment debt owing by the syndicate to the plaintiffs.

It is said on behalf of the defendant that this was a promise by him by word of mouth to make himself answerable for the debt of the syndicate. It is said on behalf of the plaintiffs that this was not a promise to make himself answerable for the debt of another—that is, the syndicate—but that it was a contract of indemnity, by which, I suppose, is meant a new contract in the nature of an original obligation.

The question which we have to decide is whether this bargain is "a promise to answer for the debt of another" within s. 4 of the Statute of Frauds. Mathew J. has held that it is not. I am sorry to say that I cannot agree with that conclusion. It seems to me that this contract was as plainly as possible a promise by the defendant to make himself answerable for the debt of the syndicate.

Our attention has been called to a great number of cases in which the Court has treated various transactions as being outside s. 4. Most of the earlier cases were what I may call

(1) (1881) 7 Q. B. D. 636.

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"property cases." They were cases in which either the person who made the promise had property which he wished to relieve from liability, or there was property which he wished to acquire. It is not necessary for me to go through those cases, but I cannot agree that the present case comes within any of that class. The defendant's promise was not, as it seems to me, either a new contract of purchase, or a new contract for the release of any property which either was his or in which he had an interest.

Our attention was next called to the exception which has been established by what I may call the "del credere cases," beginning with *Couturier* v. *Hastie* (1) and coming down to *Sutton & Co.* v. *Grey*. (2) It has been said, and I think truly, that these cases are of a different species from the property cases. I say of a different species, not of a different genus, because I think there is a wider genus, which can be plainly and simply defined, within which both of these species fall. So far as I can see, the authorities have left us with a general rule, which I will attempt to define presently, and each of these two classes of cases falls within that general rule. In each of them, I think, the form of the promise given by the promisor has never been held to be conclusive of the matter. He may, or he may not, promise in terms to answer for the debt of another; but, whether he does so or not, it is the substance, not the form, which is regarded.

Before leaving these instances I wish to mention one other class, which I do not treat as an exception from s. 4, but which, I think, does not come within the section at all. I mean the cases which have been spoken of as "indemnity cases." Of course in one sense all guarantees, whether they come within s. 4 or not, are contracts of indemnity. But the difference between those indemnities which come within the section and those which do not is very shortly thus expressed in the notes to *Forth* v. *Stanton* (3): "These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable."

(1) 8 Ex. 40.
(2) [1894] 1 Q. B. 285.
(3) Williams' Notes to Saunders, ed. 1871, vol. i. p. 234.

That, to my mind, is an accurate definition of a guarantee or indemnity which comes within s. 4 of the statute, as distinguished from an original liability which is not within the section, and which has no reference to the debt of another, but creates a new liability which is undertaken by the promisor, and has been called in the course of the argument a contract of indemnity. I will not go through these cases at length, but it seems to me that *Guild & Co.* v. *Conrad* (1) entirely confirms this as being the true view of the distinction between an indemnity and a guarantee which comes within s. 4. That case was decided by Lindley, Lopes, and Davey L.JJ. There the defendant had orally promised the plaintiff that if he would accept certain bills for a firm in which the defendant's son was a partner, the defendant would provide the plaintiff with funds to meet the bills, and it was held (affirming the judgment of Mathew J.) "that this was a promise of indemnity and not of guarantee, and therefore not required by s. 4 of the Statute of Frauds to be in writing." Lindley L.J. in the course of his judgment said (2): "The authorities are *Thomas* v. *Cook* (3) and *Wildes* v. *Dudlow*. (4) *Thomas* v. *Cook* (3) appears to me to be undistinguishable from this case if the facts here are such as I take them to be." Then the Lord Justice cited the following passage from the judgment of Parke J. in *Thomas* v. *Cook* (3): "This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same." And Davey L.J. said (5): "In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability, independently of the question whether a third person makes default or not."

(1) [1894] 2 Q. B. 885.
(2) [1894] 2 Q. B. at p. 892.
(3) (1828) 8 B. & C. 728; 32 R. R. 520.
(4) (1874) L. R. 19 Eq. 198.
(5) [1894] 2 Q. B. at p. 896.

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It seems to me that those judgments entirely confirm the view which is taken in the note to *Forth* v. *Stanton* (1), which I have read.

In my judgment, the circumstances of the present case shew plainly that there was a guarantee of the payment of a debt for which the syndicate was primarily liable, and not an original promise by the defendant to keep the plaintiffs indemnified. In my judgment, a contract of indemnity does not come within s. 4, but I think there is nothing to justify us in holding that in the present case the contract is a contract of indemnity. In my opinion, it is a contract of guarantee—"a promise to answer for the debt of another."

I will now go back to those cases which, so far as the words of the contract are concerned, might come within s. 4, but which have been held not to come within it because of the object of the contract. Whether you look at the "property cases" or at the "del credere cases," it seems to me that in each of them the conclusion arrived at really was that the contract in question did not fall within the section because of the object of the contract. In each of those cases there was in truth a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. As I understand those cases, it is not a question of motive—it is a question of object. You must find what it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property—the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker's office—in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section. This definition or rule for ascertaining the kind of cases outside the section covers both "property cases" and "del credere cases."

(1) Williams' Notes to Saunders, ed. 1871, vol. i. p. 234.

Can we then in the present case find any larger contract? I cannot. It seems to me plain upon the evidence that the only matter which was present to the mind of the defendant, and was presented by him to Mr. Winter, was this: "Will you forbear for a time? Will you give the syndicate, which I believe has a future before it, an opportunity of turning round? I believe that if it has that opportunity, it will do well and will be able to pay you. And to induce you thus to forbear I will give you bills which shall secure the payment at specified periods of the judgment debt, in case the syndicate does not pay you itself." That, I think, is the true effect of the conversation, and it seems to me that was the whole of the contract, and there was neither a purchase nor a del credere arrangement, nor anything else beyond that bargain. And the mere fact that the defendant had, as he seems to have done, financed the syndicate to a large extent, and that that was his motive for thus coming forward and bargaining for forbearance, cannot make any difference in the object of the contract. That might have been the motive which induced him to make himself answerable for the debt of the syndicate, but it was not the object of the contract. The object was simply to obtain the forbearance of the creditors in respect of the debt.

It was suggested that the true definition of cases which do not come within s. 4 should be, not those in which the obligation to pay the debt of another is an incident of a larger contract, but those in which the main object is to secure the promisor's own personal interest. But, I think, if such a definition were adopted, there would be nothing left to come within s. 4, because in every case there must be a consideration for which the promisor bargains to come to him from the promisee. That is as true of mere forbearance as of anything else. If the contract is that the promisor will be answerable for the debt due to the promisee if he will forbear, if the main object is to obtain that forbearance, and the promisor wishes to obtain it, that would be sufficient to take the case out of the statute. In my opinion so to hold would be simply to repeal s. 4.

I wish to say a word about *Fitzgerald* v. *Dressler* (1), which

(1) 7 C. B. (N.S.) 374.

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was decided long after *Couturier* v. *Hastie*. (1) In his judgment in *Fitzgerald* v. *Dressler* (2) Cockburn C.J. quoted the note to *Forth* v. *Stanton* (3), and expressly approved of it, subject to one qualification. The passage which he quoted was this: "The fair result seems to be that the question, whether each particular case comes within this clause of the statute (s. 4) or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." The learned judge added: "I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there, as the result of the authorities, that, if there be something more than a mere undertaking to pay the debt of another, as, where the property, in consideration of the giving up of which the party enters into the undertaking, is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking."

I wish to point out that Cockburn C.J. was there in terms dealing only with the "property cases" as an instance—and I think it is clear that he intended to deal with them only as an instance—of a general rule. I have attempted to define that general rule, and, I think, that every one of the exceptions which is to be found in the decided cases comes within the rule, as I have defined it.

(1) 8 Ex. 40.

(2) 7 C. B. (N.S.) 374.

(3) 1 Wms. Saund. 211 e.

In my opinion the judgment of Mathew J. should be reversed, and the appeal allowed.

I have said nothing about the question of damages because, in the view which we take, it does not arise.

STIRLING L.J. I am of the same opinion. But, as the case is one of difficulty, and we are differing from Mathew J., and we have heard a most excellent and elaborate argument, I will add a few words of my own, though I agree entirely with what has been said by Vaughan Williams L.J.

In my opinion the decision in *Guild & Co.* v. *Conrad* (1) does not apply. It is, I think, impossible to arrive at the conclusion at which the learned judges arrived in that case, namely, that the defendant's contract was to pay the debt whether the syndicate, of which he was a director, could or could not pay it. In *Guild & Co.* v. *Conrad* (1) it was found that the contract was not to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay, but the contract was to provide funds to enable the plaintiffs to meet certain acceptances. In the present case it seems to me that the transaction in contemplation was to give time to the syndicate in the expectation that in the interval they would be placed in funds by which they would be enabled to pay all their debts. The important element corresponding to that which existed in *Guild & Co.* v. *Conrad* (1), namely, the absence of any expectation that the syndicate would ever be able to pay, is here wanting.

That being so, we have to consider whether the contract was "to answer for the debt, default, or miscarriage of another person" within the meaning of s. 4 of the Statute of Frauds. Undoubtedly the decisions run fine in these cases, and the main stress of the argument has been an attempt to extend the doctrine laid down in *Couturier* v. *Hastie* (2) and *Sutton & Co.* v. *Grey* (3) to the present case, though reliance was also placed on some earlier authorities with which I will first deal. I accept

(1) [1894] 2 Q. B. 885.
(2) 8 Ex. 40.
(3) [1894] 1 Q. B. 285.

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the passage which has been read from the judgment of Cockburn C.J. in *Fitzgerald* v. *Dressler* (1) as stating accurately the law with reference to two classes of cases, of which *Williams* v. *Leper* (2) and *Walker* v. *Taylor* (3) are the types. I do not forget that in *Williams* v. *Leper* (2) a promise to pay rent was given by an auctioneer who had possession of property under instructions from the real owner to sell it; but, when the reasons assigned by the learned judges for their decision are examined, it appears to me that the auctioneer was treated by them as the agent of the owner, and as having authority from him to enter into a contract to pay the rent out of the proceeds of the sale. The promise must be taken to have been that of the owner, and, therefore, the case is brought within the statement of the law to which I have just referred.

Again, in *Walker* v. *Taylor* (3) it seems to me that the transaction really was a purchase by the defendant of a right of the plaintiff, which the defendant thought would be valuable to him. Having acquired the right he refused to pay, and it was held that the case did not fall within the statute.

I come then to *Couturier* v. *Hastie* (4), in which it was held that a contract by a del credere agent was not within the statute. From the judgment of Bowen L.J. in *Sutton & Co.* v. *Grey* (5) it is clear that he regarded *Couturier* v. *Hastie* (4) as going to the very verge of the law, and he referred to the observations upon it made by Page Wood V.-C. in *Wickham* v. *Wickham*. (6) In *Sutton & Co.* v. *Grey* (7) there was a contract between a firm of brokers and the defendant of which the terms were that he should introduce clients to them, and that the plaintiffs should transact business on the Stock Exchange for the clients thus introduced, and that, as between the plaintiffs and the defendant, he should have half the commission earned by the plaintiffs in respect of any transactions by them for any clients introduced by him, and he should pay to the plaintiffs

(1) 7 C. B. (N.S.) 374.
(2) 3 Burr. 1887.
(3) 6 C. & P. 752.
(4) 8 Ex. 40.
(5) 69 L. T. (N.S.) 354, at p. 355.
(6) (1855) 2 K. & J. 478, at p. 487.
(7) [1894] 1 Q. B. 285.

half of any loss which might be incurred by them in respect of those transactions. The plaintiffs claimed to recover from the defendant half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of a person who had been introduced to them by the defendant, and it was held that, the defendant having an interest in the transactions equally with the plaintiffs, the principle of *Couturier* v. *Hastie* (1) applied. Lord Esher M.R. (2) cited the above quoted passage from *Fitzgerald* v. *Dressler* (3), and commented on it thus: "The learned judge there used the words 'has himself no interest in the property which is the subject of the undertaking' because he was dealing with a case of property; but if his words be read, as I think they should be, 'has no interest in the transaction,' he is adopting that interpretation of *Couturier* v. *Hastie* (1) which I think is the right one." It is upon this passage in the judgment of Lord Esher that the argument for the plaintiffs in the present case has been really founded. But, as it seems to me, both in the judgment of Cockburn C.J. in *Fitzgerald* v. *Dressler* (3) and in the judgment of Lord Esher M.R. in *Sutton & Co.* v. *Grey* (4), the word "interest" means some species of interest which the law recognises. In the present case the defendant had no such interest in the property which was about to be seized by the sheriff. He was a director of the syndicate who had, no doubt, a deep interest, in the popular sense of the word, in its proceedings. He held a large number of shares: I believe he was the largest shareholder in the syndicate. He had also financed the syndicate, but he had nothing in the nature of a charge on their property; he was at the utmost a general creditor of the syndicate.

It has been contended that we ought to read the words "interest in the transaction" in a wide sense, and as importing a "business interest" in the syndicate—that kind of interest which a creditor and a shareholder of a company has in its prospects. To do this would, I think, go a long way to repeal s. 4 of the Statute of Frauds, and to extend the doctrine of

(1) 8 Ex. 40.
(2) [1894] 1 Q. B. 285, at p. 289.
(3) 7 C. B. (N.S.) 374.
(4) [1894] 1 Q. B. 285.

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Couturier v. *Hastie* (1) very much further than I am prepared to extend it.

For these reasons I think that the appeal ought to be allowed, and the judgment of Mathew J. reversed.

COZENS-HARDY L.J. I agree. It seems to me, for the reasons which my Lord has given and which I will not repeat, that this was certainly not a contract of indemnity. Primâ facie the contract falls within s. 4 of the statute, unless it can be brought within some recognised or some logical exception. One great peculiarity is this, that neither the plaintiffs nor the defendant had possession of or had any interest in the goods of the syndicate. But it has been forcibly and most ably argued that the case is brought within the recognised exceptions from the section, because the defendant, though he had no legal right to or interest in the goods, yet had in a business sense an interest in them. It has been argued that we ought to look at the object of the promise which the defendant made, and that if we can come to the conclusion that his object in giving the promise was to secure a benefit for himself, and not to secure forbearance for the syndicate, then we ought to hold that the case is not within the statute at all. I cannot agree with that argument. It seems to me to involve a confusion between object and motive. I cannot doubt that the object of the promise which was made by the defendant was to secure the forbearance of the plaintiffs, for three months and six months, in enforcing the debt due from the syndicate.

If that be so, the authorities do not, as it seems to me, in any way support Mr. Russell's contention. They have been divided conveniently into three classes. The first consists of what have been called "the property cases." I do not think they can be dealt with more accurately, and certainly not more shortly, than they were by Williams J. in his judgment in *Fitzgerald* v. *Dressler* (2), where he said: "At the time the promise was made the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the

(1) 8 Ex. 40.

(2) 7 C. B. (N.S.) at p. 394.

promise was neither more nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiffs' lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute." And he referred to *Williams* v. *Leper* (1); *Castling* v. *Aubert* (2); and *Anstey* v. *Marsden*. (3)

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Then stress has been laid on what have been called "the document cases." Those cases seem to me to stand on an entirely different footing. If I go to a banker or to another person who holds documents as security for a debt, and I ask him to hand over the documents to me on payment of the debt, that is simply a purchase of the security. Although in this way I have become answerable for the debt of another, that is not the main object of the contract.

The third class consists of those cases which have been called "the del credere cases." When they are fairly regarded, they seem to me to amount only to this: that a contract, e.g., for the employment of a del credere agent, need not be in writing, although it incidentally involves the answering for a debt of another person. In other words, if the Court can find that there is a main contract, the object of which is not to answer for the debt of another, that contract is not within s. 4, even though incidentally it may result in a liability to answer for the debt of another.

For these reasons I agree with the Lords Justices, and think that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *West, King, Adams & Co.; Sharpe, Parkers & Co.*

(1) 3 Burr. 1887.
(2) 2 East, 325.
(3) (1804) 1 B. & P. (N.R.) 124; 8 R. R. 713.

W. L. C.

C. A.

1902
March 14, 15, 17.

[IN THE COURT OF APPEAL.]

MAYOR OF BLACKBURN *v.* SANDERSON.

Local Government—Street—Paving—Making up—Landowner—Frontager—Notice to Pave and Make up—Paving Expenses, Recovery of—Summary Jurisdiction—Action in High Court—Option of Jurisdiction—Six Months' Limit for Proceedings—Local Act—"Back Roads"—"Cross Roads"—Mistake in Notice—Validity of Notice—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 140, 145—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Blackburn Improvement Act*, 1882 (45 & 46 *Vict. c. ccxliii.*).

Sect. 232 of the Blackburn Improvement Act, 1882, enacted that expenses incurred by the corporation of Blackburn in paving any street under the provisions of the Act should be recoverable by them either by summary proceeding before two justices—which proceeding is, by s. 11 of the Summary Jurisdiction Act, 1848, required to be commenced within six months from the time of the cause of action arising—"or, if the corporation think fit, in the superior Courts or any Court of competent jurisdiction."

Certain frontagers having failed to comply with a notice under the local Act to pave a street in the borough, the corporation, acting under their powers, themselves paved the street, and in July, 1898, served the frontagers with notice of apportionment of the expenses and demand for payment. The frontagers made default in payment, whereupon the corporation, in February, 1900, commenced an action against them in the Queen's Bench Division for the recovery of the apportioned expenses. The defendants resisted the plaintiffs' claim on the ground that, upon the construction of s. 232 of the local Act, the claim was too late, inasmuch as the six months' limitation under s. 11 of the Summary Jurisdiction Act, 1848, applied to proceedings whether under the summary jurisdiction or otherwise:—

Held, that under s. 232 the corporation had an option to proceed for the recovery of paving expenses either by complaint before justices under the summary jurisdiction or, alternatively, by action in the superior Courts or in any Court of competent jurisdiction; that the six months' limitation applied only to a proceeding under the summary jurisdiction, and not to any of the alternative proceedings, and that the action was therefore not out of time.

West Ham Local Board v. *Maddams*, (1876) 40 J. P. 470; and *Tottenham Local Board* v. *Rowell*, (1876) 1 Ex. D. 514, distinguished.

Vestry of Hammersmith v. *Lowenfeld*, [1896] 2 Q. B. 278, overruled.

Decision of Mathew J. reversed.

The local Act contained separate and distinctive definitions of a "back

road" and a "cross road." The corporation served a paving notice under the Act upon frontagers in a back road and two cross roads by reference to a plan deposited for inspection at the office of the borough surveyor, but the notice by mistake described all the three roads upon which the work was to be done as "back roads" only:—

Held, affirming Mathew J. on this point, that the mistake in the description could not have misled the frontagers, and that, therefore, the notice was a good foundation for an action brought by the corporation under the Act for expenses incurred by them in executing the work themselves in the cross roads as well as the back road.

APPEAL from a decision of Mathew J.

By the Blackburn Improvement Act, 1882 (45 & 46 Vict. c. ccxliii.), an Act to consolidate and amend various local Acts relating to the borough of Blackburn, and to make further provision for its local government and improvement, it was enacted in the definition clause, s. 3, that the word "street" applied to part of a street or road, and, unless there was something repugnant to such construction, should mean and include any back road, cross road, and other way whatsoever other than a passage which was part of and led solely to a private dwelling-house, or other building or land; that "back road" meant a road upon which the backs alone of dwellings abutted; and that "cross road" meant a road leading from any street, upon which the fronts of dwellings or other buildings abutted, to any back road.

By s. 26 it was enacted that in case at any time any street within the borough, not being a highway repairable by the inhabitants at large, was not sewered, paved, &c., and made good to the satisfaction of the corporation, the corporation might by notice—required to be in writing (s. 348)—to the respective owners or occupiers of the lands fronting or abutting upon such parts of any such street as might require to be sewered, paved, &c., or made good, require them to sewer, pave, &c., and make good the same within such time and in such manner as should be specified in such notice; and that, if the requirements of such notice should not be complied with, the corporation might, if they thought fit, themselves execute the works, and the expenses incurred by them in so doing should be settled by their surveyor and be paid by the owners

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in default, and in such proportions as should be settled by the surveyor.

Sect. 232 was as follows: "All damages, costs, and expenses recoverable under this Act, or the local Acts or any of them, or under any by-laws made thereunder, and all penalties under any such Act or by-law, shall be recoverable by the corporation, either according and subject to the provisions of 'The Railways Clauses Consolidation Act, 1845,' with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, and as if the word 'corporation' were inserted therein instead of the word 'company,' or, if the corporation think fit, in the superior Courts or any Court of competent jurisdiction."

Sect. 245 enacted that where the corporation had incurred expenses for the repayment of which any owner was liable under the Act, the same might be recovered from the owner on the completion of the works for which such expenses had been incurred in the manner provided by the Act, and might be declared a charge on the property in respect of which they had been incurred, "and in all summary proceedings by the corporation for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand."

Sect. 247 enacted that successive owners of the lands, &c., in respect of which any such expenses as were referred to in s. 245 had been incurred should be liable to the corporation for the payment of the same with interest as thereinafter mentioned, and such expenses "shall constitute a debt due from each successive owner to the corporation, recoverable from him in a summary manner within six calendar months of his succession, and after that period may be recovered by the corporation from the owner for the time being of the lands, houses, or other property by action at law in any Court of competent jurisdiction to entertain an action for recovery of the amount of such debt: Provided that no debt shall be recovered under the provisions of this section after the expiration of six years from the completion of the works, in respect of which such debt is

due, or in the case of instalments, after the expiration of three years from the time when any instalment became due."

Sect. 252 enacted that the corporation might, in respect of any expenses for the repayment of which the owner or occupier of the property in respect of which the same were incurred was liable, allow time not exceeding seven years for the repayment thereof, either in one sum or by instalments, with interest not exceeding 5 per cent. per annum, "but all sums so remaining due, notwithstanding the corporation have agreed so to allow time, shall from time to time at the expiration of the several times allowed be recoverable from the respective owner or occupier for the time being both present and future in succession, one after another, as the same respectively would have been recoverable from the original owner or occupier if no such time had been allowed, and with respect to any instalment the time limited by any Act, for the recovery of the expenses of which it forms part, shall be deemed to run only from the time when such instalment becomes due."

There were numerous other sections, from 234 to 249, not requiring to be set out here in detail, containing provisions for securing to the corporation payment of all expenses incurred by them under the Act.

The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), contains, in s. 140 and following sections, provisions for the recovery of penalties.

Sect. 140 provides that "In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices."

Sect. 145 provides that every penalty imposed by that or the special Act, or by any by-law made in pursuance thereof, the recovery of which was not otherwise provided for, might be recovered "by summary proceeding before two justices"; and s. 151 provides that no person should be liable to the payment of any penalty imposed by virtue of that or the special Act "for any offence made cognizable before a justice, unless the

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complaint respecting such offence shall have been made before such justice within six months next after the commission of such offence."

By s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), it is enacted, "That in all cases where no time is already or shall hereafter be specially limited for making any such complaint"—that is, a complaint upon which a justice or justices may be authorized by law to make an order—"or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

On October 7, 1896, the corporation served a notice in writing, under the Blackburn Improvement Act, 1882, upon the defendants, Sanderson, Howson & Waugh, who were the owners of houses abutting on streets or roads within the borough, which were described in the notice as the "back roads" between Esther Street and Kenyon Street, requiring them to sewer, pave, &c., and make good so much of those "back roads" as the houses abutted upon.

The notice referred to a plan and description of the works deposited for inspection at the office of the borough surveyor.

It appeared that there was in reality only one "back road" between Esther Street and Kenyon Street, and that this back road terminated at each end in a cross road uniting those two streets; but the deposited plan indicated, as the roads referred to in the notice, both the "back road" and the two "cross roads," the whole being coloured pink on the plan. Neither the back road nor the cross roads had any specific name: they were simply roads or streets included in the general terms "back roads" and "cross roads" mentioned in the Act.

As the defendants did not comply with the notice, the corporation themselves made up the back road and cross roads; and on July 1, 1898, notice of an apportionment made by the borough surveyor of the expenses so incurred by the corporation, and demanding payment, was served upon the defendants

in respect of their properties in the back road and cross roads. The defendants, however, objected to the apportionment on the ground of some irregularity in the mode of apportionment, and that no proper notice had been served upon them, the defendants, requiring them to make up the "cross roads." Notice of reapportionment, and demand for payment, of the expenses, including those of making up the "cross roads," was then given by the corporation to the defendants on July 18, 1898, but the demand was not complied with as regarded the apportionment in respect of the "cross roads."

On February 28, 1900, the corporation issued the writ in the present action in the Queen's Bench Division, claiming a total sum of 58*l.* 18*s.* 10*d.* as being the apportioned expenses in respect of the defendants' houses in the cross roads, including interest. The defendants in their statement of defence contended that the action could not be maintained on the grounds (1.) that no proper notice to make up the "cross roads" had ever been given to them; and (2.) that the action had not been commenced within the time limited by ss. 232 and 245 of the Blackburn Improvement Act, 1882, and s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). In their reply the plaintiffs contended that that limitation of time did not apply to the present action.

The action was tried on December 19, 1900, before Mathew J., who in giving judgment held, upon the first point, that the notice of October 7, 1896, was amply sufficient. Upon the second point the learned judge said he could not distinguish the case from *West Ham Local Board* v. *Maddams* (1), *Tottenham Local Board* v. *Rowell* (2), and *Vestry of Hammersmith* v. *Lowenfeld* (3), and that upon the authority of those cases and upon the construction of s. 232 of the Blackburn Act he must hold that the expenses were recoverable only within six months from the date of the demand, the six months' limitation imposed by s. 11 of the Summary Jurisdiction Act, 1848, being, by s. 232, intended to apply, not merely to summary proceedings, but also to the alternative and optional proceedings given

(1) 40 J. P. 470. (2) 1 Ex. D. 514.
(3) [1896] 2 Q. B. 278.

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by the section. Judgment was accordingly given for the defendants.

The plaintiffs appealed.

The appeal was heard on March 14 and 15, 1902.

Macmorran, K.C., *Danckwerts, K.C.*, and *W. Mackenzie*, for the plaintiffs. Upon the construction of s. 232 of the local Act, the time for recovery of these expenses is not limited to six months from the date of demand, except in the case of a proceeding under the summary jurisdiction. The section gives the corporation an option to adopt either of three remedies—one of three modes of procedure. When alternative remedies are given, it does not follow, as Mathew J. held, that the shortest period of limitation applies to each. The period of limitation in the case of each remedy is part of the lex fori; and, in the absence of express provision to the contrary, the remedy may be pursued in each Court according to the practice and procedure of that Court. In a proceeding before justices the period would be six months, while in a county court or in the High Court it would be twenty years: *Huber* v. *Steiner* (1); *Shepherd* v. *Hills*. (2) *West Ham Local Board* v. *Maddams* (3) and *Tottenham Local Board* v. *Rowell* (4), relied on by the learned judge, are distinguishable, the enactments considered in those cases being different from those here. Moreover, in those cases the Court had to deal with what was pointed out as a manifest "absurdity" in the then existing legislation, namely, that demands above 20*l*. could be recovered within six months only, under the summary jurisdiction before two justices, whereas demands below 20*l*. might be recovered in a county court at any time within six years. That "absurdity" the Court got over by holding that the same limit of time, six months, applied in proceedings both before the county court and before the justices. In *Mayor of Leeds* v. *Robshaw* (5), however, a case very near the present, the Court held that, under s. 96 of the

(1) (1835) 2 Bing. N. C. 202; 42 R. R. 598.
(2) (1855) 11 Ex. 55.
(3) 40 J. P. 470.
(4) 1 Ex. D. 514.
(5) (1887) 51 J. P. 441.

Leeds Improvement Act, 1877, proceedings before the justices for the recovery of expenses must be brought within one year, but that there was no such limitation in proceedings by way of action in the county court. *Wortley* v. *Vestry of St. Mary, Islington* (1), where recovery of expenses was allowed after a lapse of fourteen years, related to a very special enactment.

It may be admitted that *Vestry of Hammersmith* v. *Lowenfeld* (2), also relied upon by the learned judge, is very like the present case. There the Court held, but, it is submitted, wrongly held, that *Tottenham Local Board* v. *Rowell* (3) applied. The *Hammersmith Case* (2) was under the Public Health (London) Act, 1891, which contains no section like s. 232 of the Blackburn Act. The learned judges in that case misapprehended the decision in *Tottenham Local Board* v. *Rowell.* (3) In the present case s. 232 gives the corporation an option as to the tribunal before which they may recover expenses. The intention of the section is to enable them, in simple cases, to take summary proceedings before the justices; whereas, in difficult cases requiring, it may be, lengthened argument by trained lawyers, an option is given of taking proceedings in the High Court. The meaning of the section is that the expenses are recoverable in the particular Court selected by the corporation and in accordance with the particular procedure of that Court: thus, the six months' limitation—which under s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), is applicable to proceedings before two justices under s. 140 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), to which reference is made in s. 232 of the Blackburn Act—has no application whatever to proceedings taken in the High Court by the corporation in the exercise of their option. Moreover, it is not the fact that all penalties imposed by the Railways Clauses Act are recoverable only by summary proceedings before justices; for instance, the penalty imposed by s. 103 for travelling without payment is not recoverable in a Court of summary jurisdiction: *Reg.* v. *Paget.* (4) At the end

(1) (1887) 51 J. P. 166.
(2) [1896] 2 Q. B. 278.
(3) 1 Ex. D. 514.
(4) (1881) 8 Q. B. D. 151.

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of this section (232) there should be implied the words "according to the procedure of each Court": that is to say, by writ if in the High Court, by plaint if in the county court, and by complaint if before the justices. No new jurisdiction is created, nor is the jurisdiction or mode of procedure in the High Court taken away or altered: *Dale's Case*. (1) The intention of the section is, not to mix up the procedure for the recovery of expenses, but to allow each Court to retain its separate jurisdiction and procedure for that purpose.

[VAUGHAN WILLIAMS L.J. referred to *St. Pancras Vestry* v. *Batterbury*. (2)]

Other sections of the Act, such as ss. 245, 247, and 252, support the view that under s. 232 the six months' limitation applies to summary proceedings only.

C. A. Russell, K.C., and *S. G. Lushington*, for the defendants. First, the notice is insufficient, for it is a notice to do work on "back roads" only, and not "cross roads," which the roads now in question are. The Blackburn Act clearly distinguishes between the two classes of roads; and there is no warrant for reading into the notice "cross roads," which come under an entirely separate definition in the Act. It is no answer to say that the frontagers can go to the surveyor's office and see for themselves the plan and description of the works, for ss. 26 and 348 require that notice in writing of the works required to be done shall be given to them.

[VAUGHAN WILLIAMS L.J. Can you contend that the defendants were misled by the notice?]

Yes; because it points to "back roads" only, as the roads on which the work is to be done. It was a neglect of duty on the part of the corporation, when they had in their Act an appropriate description of the place where work was to be done, to omit that description—"cross roads"—in the notice. They should have distinguished between the work to be done on the "back roads" and the work to be done on the "cross roads."

With regard to the time limit for taking proceedings for the recovery of the expenses incurred by the corporation under s. 26 of the local Act, the object of the Act is to fix a reasonable

(1) (1881) 6 Q. B. D. 376, 465. (2) (1857) 2 C. B. (N.S.) 477.

limit of time within which the corporation may recover, and to prevent inconvenience or hardship to the owner through delay. The time limit fixed by s. 11 of the Summary Jurisdiction Act, 1848, and which under s. 245 of the local Act runs from the date of notice of demand and not from the completion of the works, is intended by s. 232 of the local Act to apply to all proceedings, in whatever Court, taken under that section. The limitation of time applies to proceedings only and not to a demand for expenses: *Wortley* v. *Vestry of St. Mary, Islington* (1); Lumley's Public Health Acts, 5th ed. p. 345.

As to the authorities, *West Ham Local Board* v. *Maddams* (2), *Tottenham Local Board* v. *Rowell* (3), and *Vestry of Hammersmith* v. *Lowenfeld* (4) are in point. The decision in *Mayor of Leeds* v. *Robshaw* (5) depended, as pointed out in the judgments, on a series of statutes relating to Leeds alone, and has, therefore, no real application to the present case.

March 17. VAUGHAN WILLIAMS L.J. Upon the first point I agree with Mathew J. The notice here is ample. In my judgment the mistake in the description of the roads as "back roads" could not have misled the defendants; but I cannot agree that the construction of s. 232 of the Blackburn Improvement Act, 1882, is governed by the different cases referred to in *Tottenham Local Board* v. *Rowell*. (3) In that case, as also in the case of *West Ham Local Board* v. *Maddams* (2), the expenses recoverable were, before the passing of the Act which gave the county court jurisdiction in proceedings for the recovery of demands below 20*l.*, recoverable only before the justices within six months, and not afterwards; and the Court held in each case that if the party exercised the option of proceeding in the county court he must do so within the same limit of time. The Court held, that is, that the Act giving the option to proceed in the county court continued as long as the right to proceed before the justices existed, and no longer; but that, when the six months had elapsed, the right to proceed before

(1) 51 J. P. 166, 167.
(2) 40 J. P. 470.
(3) 1 Ex. D. 514.
(4) [1896] 2 Q. B. 278.
(5) 51 J. P. 441.

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the justices was gone, and therefore no option could be exercised, and the right to sue in the county court was at an end. By the earlier Acts the period for recovery was limited to that which was incident to a summary remedy. The Legislature did not say that the six months' limitation imposed on the right of action so created was to be altered when it enacted by a later Act that the statutory right of action might be enforced in a county court. This is the view of the meaning of those decisions which was taken by the Court in *Mayor of Leeds* v. *Robshaw* (1), and I think that it is the plain meaning; but I agree with Mr. Russell that that case is not conclusive of the present case, because in that case the right was a right which the original statute, the Leeds Improvement Act, 1877, creating the right, allowed to be enforced by proceedings which had no limitation like that contained in the Summary Jurisdiction Act, 1848. That Act of 1877 gave a remedy by way of summary proceedings limited to one year. All that the Court held in that case was that the limit to the summary proceedings allowed by the Act of 1877 did not constitute a limitation of the remedies given by the prior local statutes in relation to the same subject-matter.

Mathew J. goes on in his judgment to refer to the case of *Vestry of Hammersmith* v. *Lowenfeld* (2) as a decision governing the construction of s. 232 of the Blackburn Improvement Act, 1882; but although that case comes much nearer to the present case than the cases of *West Ham Local Board* v. *Maddams* (3) and *Tottenham Local Board* v. *Rowell* (4) do, yet I cannot think that they govern the construction of s. 232. The words of clause 2 of s. 11 of the Public Health (London) Act, 1891, which Cave and Wills JJ. had to construe in that case, were "such costs and expenses and any fines incurred in relation to any such nuisance may be recovered in a summary manner, or in the county court or High Court"; and the Court held that this triple option ceased to exist if one of the options ceased to be available by lapse of time by reason of a limitation applying to that option only—namely, a limitation of six months in the case

(1) 51 J. P. 441.
(2) [1896] 2 Q. B. 278.
(3) 40 J. P. 470.
(4) 1 Ex. D. 514.

of summary procedure. Now I would remark, with reference to that case, first, that the words there construed are not the same as the words we have to construe in the Blackburn Act; and I would say further that, although the Court held the case to be governed by the decision in *Tottenham Local Board* v. *Rowell* (1), not only were the right and the remedies all given by one Act—unlike the cases of *Tottenham Local Board* v. *Rowell* (1) and *West Ham Local Board* v. *Maddams* (2), in which a right subject to a limitation was created by the original Act, and jurisdiction given by a later Act to enforce that right in the county court—but also in the case of *Vestry of Hammersmith* v. *Lowenfeld* (3), it seems to me that to have held the limitation in the Summary Jurisdiction Act not to apply to actions under s. 11 of the Public Health (London) Act would not have led to the absurdity of holding that there was a different limitation in the case of actions brought to recover sums under 20*l.* from that which was to prevail in cases above 20*l.*, which was a consideration which weighed very much with the Court in the decision of both those cases.

I now proceed to deal with the words of s. 232. It runs thus: "All damages, costs, and expenses recoverable under this Act . . . . shall be recoverable by the corporation, either according and subject to the provisions of 'The Railways Clauses Consolidation Act, 1845,' with respect to the recovery of damages not specially provided for, and of all penalties, and to the determination of any other matter referred to justices . . . . or, if the corporation think fit, in the superior Courts or any Court of competent jurisdiction." Now, I think that there is nothing in these words, or in the decisions to which I have referred, to make the Court hold that, because the summary remedy under the Railways Clauses Consolidation Act, 1845, is barred by a six months' limitation, after that lapse of time proceedings in the superior Courts or any Court of competent jurisdiction are barred. Certainly, the reasons upon which the *West Ham Case* (2) and the *Tottenham Case* (1) were decided are not available, and the words are different from those in s. 11 of the

(1) 1 Ex. D. 514. (2) 40 J. P. 470.
(3) [1896] 2 Q. B. 278.

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Public Health (London) Act, 1891, which were construed in *Vestry of Hammersmith* v. *Lowenfeld* (1); and I think, upon the words themselves, the meaning of s. 232 is that the corporation during the period of six months may recover the expenses by summary proceedings, or if the corporation think fit by action in the superior Courts or any Court of competent jurisdiction, and after that only by proceedings in the High Court or some other Court of competent jurisdiction. This view of the meaning of the words is much strengthened by consideration of other sections of the Blackburn Act. In the first place, we find in s. 247, which deals with the liability of successive owners, that these expenses shall be recoverable from each successive owner in a summary manner within six calendar months of his succession, and after that period may be recovered by the corporation from the owner for the time being of land, &c., by action at law in any Court of competent jurisdiction, "provided that no debt shall be recovered under the provisions of this section after the expiration of six years from the completion of the works, in respect of which such debt is due." It seems plain from this that the six months' limitation is not intended to be applied in the case of successive owners; and it seems most improbable that the Legislature should have intended this limitation of six months not to apply in the case of successive owners, and to apply in the case of the original owner at the time when the works were executed, the expense of the execution of which is the subject-matter of recovery. There are many other sections of the Blackburn Act which seem to indicate that the limitation with regard to summary proceedings is applicable only to that mode of procedure; as, for instance, the last words of s. 245. These words are: "And in all summary proceedings by the corporation for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand." Why are these words not expressed to apply to all proceedings if the limitation is to apply to all proceedings? And, again, s. 252, under which the corporation may allow seven years for

(1) [1896] 2 Q. B. 278.

repayment of expenses due from owners, tends to negative such a limitation in proceedings other than summary proceedings.

I have only to add that, in my judgment, if you find in an Act of Parliament the power to take the remedy in divers Courts, that remedy will, in each Court, be subject to the lex fori of that Court, and the lex fori includes the limitation of actions, which goes to the remedy and not to the right. I think, therefore, that this appeal must be allowed.

STIRLING L.J. I am of the same opinion on both points. As to the first point, on which we agree with Mathew J., I do not desire to say anything. On the second point, upon which we differ from him, I desire to state the grounds on which my opinion rests.

The corporation of Blackburn, acting under s. 26 of the Blackburn Improvement Act, 1882, have executed certain paving work, and the section goes on to provide that the expenses incurred by them in so doing shall be settled by their surveyor and be paid by the owners in default and in such proportions as shall be settled by the surveyor. An apportionment has been duly made, and this action is brought to recover the amount due from the defendants, who are owners affected by the apportionment. Now, as regards the mode of recovery of these expenses, s. 232 applies; but the section does not apply, it is to be observed, to paving expenses alone. It is a general clause providing as follows: [The Lord Justice read the section, and continued:—]

Now, that section contains no express enactment as to the period of time within which proceedings are to be taken, but on reference to the provisions of the Railways Clauses Consolidation Act, 1845, we find it provided by s. 140 that "In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices"; and that clause brings into operation the limitation of time which is imposed by the Summary Jurisdiction Act,

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1848, regulating proceedings before two justices. It is therefore contended that, inasmuch as the proceedings taken according and subject to the provisions of the Railways Clauses Consolidation Act, 1845, must be brought within a certain limit of time, the proceedings in the superior Courts or in any Court of competent jurisdiction which the corporation are, by s. 232 of their Act, authorized to take must be brought within the same limit of time. Now I confess, speaking for myself, that if this question were free from authority I should not arrive at that conclusion upon the language of that section. If the Legislature had intended to prescribe a limit of time for taking proceedings of every kind, I cannot think that such a circuitous and obscure mode of doing it would have been chosen, and one can see other reasons for giving such an option as here exists to the corporation. The section is a wide one, as I have already pointed out. The "damages, costs, and expenses" there referred to may vary very much in amount, and the questions which arise with reference to them may also vary considerably as regards their legal difficulty, and even if the section were limited to paving expenses alone such would be the case. Where the amount sought to be recovered is small and no difficulty arises, it is for the benefit both of the corporation who have to enforce payment of those damages, costs, and expenses, and also for the benefit of those who have to pay them, that a cheap and speedy mode of enforcing payment should be provided. In other cases, where the amount is large and legal difficulties arise, it is desirable to provide that recourse may be had to the higher Courts. In those circumstances I should not myself infer from the language of s. 232 that it was the intention of the Legislature to impose on proceedings in the superior Courts or other Courts of competent jurisdiction the same limit of time as is imposed on proceedings in Courts of summary jurisdiction; but at the same time it is quite possible that there may be found in other clauses of the local Act language indicating what the intention of the Legislature was. Beginning with s. 234 and going down to s. 249, there is a series of clauses dealing with the question of paving expenses. I have read those sections carefully,

and it seems to me that their language, so far from being favourable to the view that a limitation of time was intended to be imposed, points in a contrary direction. That language has already been commented upon by Vaughan Williams L.J., and I will therefore merely say this, that s. 247, which deals with the liability of successive owners and shews plainly that the proceedings against successive owners are not limited to the time prescribed by the Summary Jurisdiction Act, appears to me to afford a strong indication that no limitation of time was intended to be imposed by s. 232.

But the matter is not free from authority, and the authorities I will refer to are those that were relied on by the learned judge who decided the present case. The first two are *West Ham Local Board* v. *Maddams* (1) and *Tottenham Local Board* v. *Rowell*. (2) Both those cases arose in very similar circumstances. There was in each an Act of Parliament which gave a summary remedy before the justices alone: that was followed by the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), which provided, by s. 24, that "proceedings for the recovery of demands below 20*l*., which local boards are now empowered by law to recover in a summary manner, may, at the option of the local board, be taken in the county court as if such demands were debts within the cognizance of such courts." So that, as regards demands above 20*l*., the summary jurisdiction was the only one which could be resorted to, and as regards demands below 20*l*. there was an option to proceed either in a summary way or in the county court. If the option with regard to demands below 20*l*. were held to be an option to proceed beyond the time which was limited with reference to proceedings under the summary jurisdiction, the result would be this—that as regards demands above 20*l*. there would be a limit of time within which the proceedings must be taken, but as regards demands below 20*l*. there would be no limit. Now, in the two cases to which I have referred that circumstance was relied on—and, as it appears to me, rightly relied on—as shewing strongly that the intention of the Legislature must have been to impose the same limit of time whether the

(1) 40 J. P. 470. (2) 1 Ex. D. 514.

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proceedings were taken before justices or in the county court; and we find that Blackburn J. in *West Ham Local Board* v. *Maddams* (1) pointed out what he termed an "absurdity" and relied on it; and that Mellish L.J. in *Tottenham Local Board* v. *Rowell* (2), which was in the Court of Appeal, also pointed it out and relied upon it. I think, therefore, that those two cases do not govern the present, being dependent on special circumstances which do not occur here.

But in *Vestry of Hammersmith* v. *Lowenfeld* (3) we find, no doubt, enactments which much more closely resemble those which occur in the statute with which we have now to deal. The action there was brought under s. 11 of the Public Health (London) Act, 1891, and sub-s. 2 of that section provides that the costs and expenses referred to in sub-s. 1 may be recovered in a summary manner or in the county court or High Court. A subsequent clause, s. 117, provides by sub-s. 1 that "all offences, fines, penalties, forfeitures, costs, and expenses under this Act or any by-law made under this Act directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts." And then sub-s. 2 provides this: "Proceedings for the recovery of a demand not exceeding 50*l*., which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken in the county court as if such demand were a debt." Now, dealing with s. 117 alone, it seems to me that in that case there were circumstances closely resembling those in *West Ham Local Board* v. *Maddams* (1) and *Tottenham Local Board* v. *Rowell* (2); and it appears to have been admitted in argument—and, I think, rightly admitted—that if the action had been brought under s. 117 the limitation would apply. The case was decided by a Divisional Court consisting of Cave and Wills JJ. Cave J. says this: "The first mode pointed out by the Act of obtaining and enforcing a nuisance order is to go before the magistrate. If the order be made, or if a fine

(1) 40 J. P. 470.

(2) 1 Ex. D. 514.

(3) [1896] 2 Q. B. 278.

be imposed and not paid, an option is given of recovering the costs and expenses or the fine either by summary proceedings or by an action in the High Court or county court. The first and most natural thing to do is to proceed summarily; and if that course be taken, the limitation of time provided by s. 11 of the Summary Jurisdiction Act, 1848, applies. The decision in *Tottenham Local Board* v. *Rowell* (1) is that when an option is given to proceed either summarily or in the county court, and a limitation of time is imposed with respect to proceeding summarily, that limitation applies also to the proceeding in the county court." Now, with the utmost respect, I am unable to agree that that is the true effect of the decision in *Tottenham Local Board* v. *Rowell* (1), though I think that, if the learned judge had applied that reasoning to s. 117, his conclusion would have been in accordance with that decision. It seems to me that the learned judge there held that, where an option was given to proceed either summarily or in the county court, and a limitation of time was imposed with respect to proceeding summarily, that limitation must also apply to proceedings in other courts. With that I am unable to agree. With regard to the judgment of Wills J., I am not sure that I differ from it. His reasoning appears to me to have been different. He begins by dealing with s. 117, and holds that proceedings under it would be governed by the decision in *Tottenham Local Board* v. *Rowell*. (1) So far I agree. Then he proceeds: "I think it is impossible to draw a distinction between s. 117 and s. 11. The language of s. 11 is somewhat different, but there is no difference in substance. Sect. 11 says that 'such costs and expenses may be recovered in a summary manner or in the county court or High Court.' What is that but saying that the person entitled to recover them may at his option select either the court of summary jurisdiction or the county court or the High Court in which to pursue his remedy? I cannot see that the option given is any the less an option because the words 'at the option' are not used. If that view be right, no real distinction can be drawn between s. 11 and s. 117." If the learned judge meant to lay

(1) 1 Ex. D. 514.

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down the same proposition of law as Cave J., then, again speaking with the utmost respect, I am unable to agree; but I am not sure that really he meant to do so. It may be that his view was—and I rather think it was—that, whatever might be the meaning of s. 11 standing by itself, it was possible to find in other sections of the Act an indication of meaning on the part of the Legislature, and as to that there can be no doubt that is perfectly possible. Wills J. found that indication of meaning in s. 117, and if his decision was based on reading s. 11 in the light of s. 117, I need only say that the present case is entirely distinct. In the Blackburn Improvement Act, 1882, there is not only no clause similar to s. 117, but there is a clause which points strongly in the opposite direction, namely, s. 247.

In these circumstances I think the appeal ought to be allowed. At the same time I think Mathew L.J. was bound to decide as he has done by *Vestry of Hammersmith* v. *Lowenfeld* (1), by which we are not bound.

COZENS-HARDY L.J. I agree that the appeal must succeed. Apart from authority, it seems to me that the true effect of s. 232 of the local Act is to entitle the corporation to recover expenses payable by an owner under s. 26 either by summary proceedings before the magistrates, which must be taken within six months, or by action in the superior Courts or in any Court of competent jurisdiction. I can see no reason for holding that the limitation of six months must apply to the alternative proceedings in the High Court; and any doubt which may be felt is removed by reference to s. 247. That section deals with the rights of the corporation against successive owners. It deals with a matter falling within s. 232, and it expressly states that the expenses may be recovered from a succeeding owner in a summary manner within six months of his succession, and after that period by action at law. Reading the two sections together, it seems clear that the limitation of six months cannot apply to an action in the High Court.

As to the authorities, the *Tottenham Case* (2) is plainly

(1) [1896] 2 Q. B. 278. (2) 1 Ex. D. 514.

distinguishable for the reasons given by Vaughan Williams and Stirling L.JJ., and which I need not repeat. As to the *Hammersmith Case* (1), it may be sufficient to say that there is no such section as the present s. 247 in that case, and thus to distinguish it. But, if necessary, I should hold that the decision of the Divisional Court in the *Hammersmith Case* (1) cannot be supported and ought not to be followed.

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Appeal allowed.

Solicitors: *Robbins, Billing & Co., for E. Fox, Blackburn; Bower, Cotton & Bower, for Ainsworth, Sanderson & Howson, Blackburn.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1902 *March* 25.

LONG *v.* THE GREAT NORTHERN AND CITY RAILWAY COMPANY.

Practice—Appeal from Order of Judge at Chambers—Land injuriously affected by Railway—Compensation—Order for Trial in Superior Court—Appeal to Court of Appeal—"Practice and Procedure"—Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119), *s.* 41—*Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An application to a judge in chambers, under the Regulation of Railways Act, 1868, s. 41, for an order that the question arising on a case of compensation under the Lands Clauses Consolidation Act, 1845, should be tried in the High Court, is not a matter of practice or procedure within the meaning of s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and an appeal from an order made on such an application lies to the Divisional Court.

APPEAL from an order of a judge at chambers.

On a claim for compensation arising out of the exercise by the Great Northern and City Railway Company of powers under their special Acts, the claimant, Richard Long, gave notice that he required that the question of the amount of compensation should be settled by a jury, and that the company should issue their warrant to the sheriff of the county of

(1) [1896] 2 Q. B. 278.

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London to summon a jury to settle the amount of the compensation in the manner provided in the Lands Clauses Consolidation Act, 1845, and the company's special Acts. The company thereupon applied under s. 41 of the Regulation of Railways Act, 1868, to Bucknill J. at chambers for an order for the trial of the question in the High Court, and the learned judge made an order to that effect.

The claimant appealed.

Danckwerts, K.C. (with him *George Cave*), on behalf of the company, took a preliminary objection to the hearing of the appeal. The appeal against the order made at chambers does not lie to this Court, but should be made to the Divisional Court. The practice and procedure mentioned in s. 1, sub-s. 4, of the Judicature Act, 1894, cover only matters of practice and procedure in connection with a cause or matter in the High Court: *Watson* v. *Petts*. (1) That was an application for a prohibition to an inferior Court, and it was held not to be within the section. Similarly an application for a writ of certiorari to remove a cause from the Mayor's Court has been decided in this Court, in an unreported case, not to come under the section: *Stevenson* v. *London Joint Stock Bank*. The present case is analogous to those cases, for the order does not relate to a cause or matter in the High Court, but to the removal of the claim for compensation from the jurisdiction of the sheriff.

C. C. Scott, for the claimant. The Court of Appeal in *Donisthorpe* v. *Manchester, Sheffield and Lincolnshire Railway* (2) entertained an appeal which arose under circumstances similar to those in the present case. The order of the judge at chambers had the effect of transferring the matter to the High Court, and so the appeal against that order refers to procedure in a cause or matter in the High Court.

COLLINS M.R. I think that the objection to this appeal is fatal, and that the point is concluded by the judgment of this Court in *Watson* v. *Petts*. (1) The question in that case was

(1) [1899] 1 Q. B. 54. (2) [1897] 1 Q. B. 671.

whether an appeal from the refusal of a judge at chambers to direct the issue of a writ of prohibition to a county court judge, to prohibit him from proceeding further on a matter in a county court, should be made to this Court. It was held that such an application—that is, the application to the judge at chambers—was not practice or procedure in a cause or matter in the High Court. That is exactly the case here. When the application was made to the judge in chambers there was no cause or matter in the High Court to which it could relate. It had reference to a claim raised in an inferior Court, as in *Watson* v. *Petts*. (1) It is said that there is a distinction, because we are at the present moment dealing with a matter which has been brought into the High Court, and with practice and procedure having reference to that matter, because the result of the application to the judge in chambers was that the proceedings were transferred to the High Court. That, however, is to apply an altogether wrong standard. The appeal that we are invited to entertain is an appeal as to whether an order dealing with practice and procedure in a matter not in the High Court, but in the sheriff's court, was rightly made. The decision of the learned judge relating to practice and procedure in a matter not in the High Court comes within the class of cases excluded from our jurisdiction by the decision in *Watson* v. *Petts*. (1) It seems to me, therefore, that the appeal must be dismissed.

ROMER L.J. I agree.

MATHEW L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for claimant: *George Brown, Son & Vardy.*
Solicitors for railway company: *Le Brasseur & Oakley.*

(1) [1899] 1 Q. B. 54.

A. M.

C. A.

1902

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[IN THE COURT OF APPEAL.]

THE KING on the Prosecution of HINDE and Others *v.* TRISTRAM and Another.

Ecclesiastical Law—Consistory Court—Patent of Commissary and Vicar-General—Reservation of Cause to Bishop where Party desires his Judgment—Legality of Reservation—Effect on Jurisdiction of Vicar-General—Want of Jurisdiction apparent on face of Proceedings—Prohibition.

By letters patent appointing a Chancellor for a diocese the bishop gave him power, in the absence of the bishop from his Consistory Court, to determine certain causes, "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments from a church in the diocese, and the respondents in their reply asked that the bishop should be first consulted and his consent had, and earnestly craved his judgment. The Chancellor heard the suit, and delivered a judgment in which he held that he had jurisdiction and dealt with the merits of the case. It appeared from the judgment, though not so stated in terms, that he had not consulted the bishop or obtained his consent either to the hearing of the suit or the terms of the judgment. On appeal from a refusal to direct the issue of a writ of prohibition:—

Held, that the limitation in the patent was not illegal; that it did not relate to procedure, but had the effect of excluding the jurisdiction of the Chancellor over the excepted causes; that the absence of jurisdiction sufficiently appeared on the face of the proceedings; and that, as the objection to the hearing of the suit by the Chancellor had not been abandoned or waived, a writ of prohibition should issue.

Judgment of the Divisional Court, [1901] 2 K. B. 141, reversed.

Appeal from the judgment of a Divisional Court, reported [1901] 2 K. B. 141.

On August 30, 1892, the Bishop of Chichester by letters patent appointed Thomas Hutchinson Tristram, D.C.L., to be commissary, official principal, and vicar-general in spirituals of the bishop and his successors in and throughout the whole archdeaconry of Lewes. The patent continued as follows: "Moreover, we do for us and our successors give, grant, and confirm unto the said Thomas Hutchinson Tristram during his natural life, that in our absence from our Consistory Court of Lewes he shall and may proceed by himself, his assignee or substitute, assignees or substitutes, as well in all and singular

causes, businesses, suits, and complaints spiritual and ecclesiastical, at the instance or promotion of whatsoever parties, as by our mere and mixed office, Also in all causes of dilapidation of the goods of the Church and robbing of Churches, and in all other businesses and causes whatsoever (except hereafter excepted) in our episcopal Consistory Court of Lewes moved or to be moved, the cognizance and decision whereof is known by law or custom of the realm to belong to our Ecclesiastical Court, and to decide and finally determine all and singular those the causes aforesaid (except hereafter excepted), with all the rights thereto incident, issuing, depending, annexed, and connexed, without breach of the laws and statutes of this excellent kingdom. Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment. . . . .

"Except, notwithstanding, and always reserved to us and our successors the complaints and supplications hereafter to be made by whatsoever clergy in all and singular causes, and reserved also to us and our successors equally to examine and determine every cause in our proper person in our Court of Consistory."

On January 18, 1899, a cause of faculty was instituted by petition on behalf of one George Davey, therein alleged to be a parishioner of the parish of the Church of the Annunciation in the town of Brighton, in the diocese of Chichester, the suit being promoted for the purpose of obtaining a faculty authorizing the removal out of the church of certain ornaments alleged to be illegal.

Appearances to the citation in the suit were entered on behalf of the respondents, the vicar and churchwardens, and they filed an answer which, in the first paragraph, denied that the petitioner was a parishioner of the parish, and of which the fifth paragraph was as follows: "The respondents allege and propound that before any decision or final determination of the cause aforesaid the Right Reverend Father in God, Ernest Roland, Lord Bishop of Chichester, should be first consulted and his consent had, and they earnestly crave his judgment in the premises, and humbly complain and supplicate that the

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said Lord Bishop should examine and determine the said cause in his own proper person in this Court."

The cause came on to be heard at Lewes before Dr. Tristram, as Chancellor of the diocese, and on February 1, 1900, he gave judgment that Davey was qualified as a parishioner to present the petition. (1)

An appeal against this decision to the Court of Arches was abandoned, and on August 21, 1900, Dr. Tristram gave judgment on the merits of the case, ordering the removal of certain ornaments from the church. (2) In the course of his judgment he dealt with the fifth paragraph of the answer of the respondents, and held that the reservation contained in the patent, "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment," was invalid; but in the order which he made he did not state that he had not consulted the bishop, or had his consent.

The respondents then applied for and obtained a rule nisi calling on Dr. Tristram and George Davey to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the suit.

After argument, before Darling and Channell JJ., the rule was discharged. (3)

The respondents appealed. (4)

Feb. 19. *Duke, K.C.*, and *E. W. Hansell*, for the respondents. The point was raised by the fifth paragraph of the answer that the respondents, earnestly craving the judgment of the bishop himself, the Chancellor had no jurisdiction, unless he should consult the bishop, and obtain his consent to his adjudicating in the suit. The attention of the Chancellor was called at the hearing to this paragraph. That having been done, it was not necessary for the respondents to continue urging this objection throughout the proceedings; and it is submitted that there was nothing in their conduct which amounted to a subse-

(1) See *Davey* v. *Hinde*, [1901] P. 95, at p. 106.

(2) See *Davey* v. *Hinde*, [1901] P. 95, at p. 114.

(3) [1901] 2 K. B. 141.

(4) The term "respondents" is used throughout this report as indicating the vicar and churchwardens, the respondents in the suit.

quent waiver of the objection, or anything which precludes them from claiming a prohibition. That the Chancellor himself did not consider the objection waived is shewn by the fact that when he gave his final judgment in the suit he dealt expressly with the objection, and held that it was bad in law, because the reservation in the patent was invalid: *Davey* v. *Hinde*. (1) Having called the Chancellor's attention to the objection to his jurisdiction, the respondents were not called upon to do anything further by way of objecting to his exercise of jurisdiction until he gave judgment overruling the objection. It is clear that there is jurisdiction to issue a writ of prohibition as long as there is anything remaining to be done under the judgment or sentence. In the Divisional Court the matter was treated as one of procedure only. The judges do not appear to have agreed with regard to the meaning of the reservation. Darling J. treated it as meaning only that the Chancellor, before giving judgment in the suit, ought to have consulted the bishop as to whether he approved of the judgment which the Chancellor proposed to deliver, which might be done out of Court and without any formality whatever. It is contended that that is not the true meaning of the reservation, and that it means that, if either party earnestly craves the judgment of the bishop, the Chancellor shall have no jurisdiction until the bishop has exercised his judgment as to whether he will hear the suit himself or allow the Chanceller to determine it. On that interpretation of the reservation the matter cannot be one merely of procedure. It goes to the jurisdiction. The reservation is not a matter between the bishop and Chancellor only. It is obviously inserted in the patent for the protection of the suitor, and, in cases to which it applies, makes the consent of the bishop a condition precedent to the jurisdiction of the Chancellor. The Report of the Ecclesiastical Courts Commission of 1883, which gives the patents of all the dioceses, shews that reservations of this kind appear in the forms of patent in use in various dioceses, some ancient and some modern, and there is nothing to shew that they are invalid or obsolete. The learned Chancellor treated the matter as

(1) [1901] P. 95, at p. 122.

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one of custom. But it is difficult to see how custom can have anything to do with the matter in relation to a patent issued within living memory, or how a document which purports to grant only a limited jurisdiction can by any process of construction be held to confer an unlimited jurisdiction. It was held in *Ex parte Medwin* (1) that a bishop must appoint a Chancellor, but the extent of the jurisdiction of the Chancellor, when appointed, appears to depend upon the practice of the particular diocese. There is nothing to shew that these reservations have become invalid at common law. [They cited on this point *Bishop of St. David's* v. *Lucy* (2); *Serjeant* v. *Dale* (3); *Hudson* v. *Tooth* (4); *Boyd* v. *Phillpotts.* (5)]

The total absence of jurisdiction appears on the face of the proceedings, and therefore the Court is bound to issue a prohibition, even after sentence, and whether the conduct of the applicants for the prohibition amounted to acquiescence in the exercise of the jurisdiction or not: *Farquharson* v. *Morgan* (6); *Broad* v. *Perkins* (7); *Mayor of London* v. *Cox.* (8) An Ecclesiastical Court is not a Court of Record in the proper sense of the term, but, if it is to be treated as one for this purpose, the record must be treated as made up, and therefore as shewing the objection taken by the pleadings and the judgment of the Chancellor upon that objection. But it is clear that the objection may for this purpose appear on the face of the proceedings, although there is no record in the strict sense of the term, as in the case of the county court: see *Farquharson* v. *Morgan.* (6) The distinction is really between cases where the want of jurisdiction depends on some fact within the knowledge of the applicant for the prohibition, which he might have brought to the notice of the inferior Court, but which he kept back, taking his chance of a judgment in his favour in that Court, and cases where, on the proceedings, the want of jurisdiction is brought to the notice of the Court below, which nevertheless proceeds to exercise jurisdiction. In the latter class of cases, on the

(1) (1853) 1 E. & B. 609.
(2) (1699) 1 Salk. 134; 3 Salk. 90.
(3) (1877) 2 Q. B. D. 558.
(4) (1877) 3 Q. B. D. 46.
(5) (1874) L. R. 4 A. & E. 297.
(6) [1894] 1 Q. B. 552.
(7) (1888) 21 Q. B. D. 533.
(8) (1867) L. R. 2 H. L. 239.

absence of jurisdiction being shewn, the superior Court is bound, for the protection of the prerogative of the Crown, to grant a prohibition: *Mayor of London* v. *Cox*. (1)

Dibdin, K.C., and *Reginald Dodd*, for the petitioner. On the construction of the reservation adopted by Darling J. it is submitted that the matter was one of procedure only. But, assuming the construction now put forward by the respondents to be correct, prohibition ought not to be granted. The jurisdiction of the Chancellor is only ousted so long as either party earnestly craves the judgment of the bishop. The party who has craved the judgment of the bishop may subsequently withdraw his objection to the Chancellor's determining the cause, and cease to crave the bishop's judgment, and then the jurisdiction of the Chancellor will again arise. It is submitted that on the facts of this case the respondents must be taken to have withdrawn their objection to the Chancellor's proceeding to determine the cause. The petition was brought in January, 1899. The answer of the respondents, which no doubt raised this objection, and also an objection to the petitioner's locus standi, was filed on March 28, 1899. The reply of the petitioner, which, inter alia, denied that the consent of the bishop was necessary to the Chancellor's having jurisdiction to determine the cause, was put in on April 14. The respondents then filed their proxy, the terms of which, so far from protesting against the exercise of jurisdiction by the Chancellor, authorized their proctor to contest the petition on the merits; or at any rate had the effect of authorizing him to waive the objection. It is true that at the commencement of the hearing in January, 1900, the counsel for the respondents called attention to the pleadings which raised this point, but the point was never argued or referred to again although the hearing lasted six days. A question as to the locus standi of the petitioner was argued, and the Chancellor delivered in February a preliminary judgment on that point in favour of the petitioner. The respondents entered an appeal to the Court of Arches against that judgment which they afterwards abandoned. The judgment on the merits was not delivered till August, 1900,

(1) L. R. 2 H. L. 239.

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and in the interval the respondents took no steps whatever by way of urging any objection to the Chancellor's jurisdiction. If the respondents meant to insist on the judgment of the bishop, they ought distinctly to have claimed a decision on this objection at the hearing, for, if it was a good objection, then all the time consumed and expense involved in the subsequent hearing on the merits were thrown away. It was not until November, 1900, that the respondents applied for a prohibition. It is submitted that they must be taken under the circumstances to have ceased, prior to the determination of the cause, to crave earnestly the judgment of the bishop.

Secondly, it is contended that by their conduct the respondents have waived the objection and acquiesced in the exercise of jurisdiction by the Chancellor so as to disentitle themselves to a prohibition. They allowed the proceedings to go on to judgment, and took their chance of succeeding on the merits, not insisting on this objection to the exercise of jurisdiction, but delaying the judgment by an appeal on another preliminary point, which they afterwards abandoned, and then nearly a year after the hearing they apply for a prohibition. It is clear from the authorities that, unless the absence of jurisdiction appears on the face of the proceedings, in the case of conduct such as that of the respondents, the Court has a discretion to refuse to issue a prohibition: *Mayor of London* v. *Cox*. (1) The absence of jurisdiction does not in this case appear on the face of the proceedings, because, for aught that appears, the Chancellor may have obtained the consent of the bishop to his determining the cause before delivering judgment. It would not be necessary that the bishop should formally hear the parties on the question whether he would himself determine the cause, or allow the Chancellor to determine it. This is not like a case where a Court entertains a matter which the Court obviously cannot have jurisdiction to try. The Consistory Court of the bishop has jurisdiction over a suit such as the present one. The question is only as to the proper constitution of the Court. It is said by Willes J. in *Mayor of London* v. *Cox* (1): "There is, indeed, a distinction after sentence

(1) L. R. 2 H. L. 239, at p. 282.

between a patent and a suggested defect, for if the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior Court, and is defeated, then, if the defect be of power to try the particular issue only (defectus triationis, as it has been called), the right to move for a prohibition is gone." It is submitted that this case comes within what the learned judge there said.

Thirdly, with regard to the validity of the reservation, it is submitted that such reservations in a patent have no legal effect. There is no actual decision that they are invalid, but there are statements in various text-books tending to shew that they are. It is quite unprecedented for a bishop to exercise jurisdiction over a case like the present under such a reservation, and there is no reported case in which effect has been given to such a reservation. Cases of heresy by the canon law could only be tried by the bishop or the Pope's delegate, and there is no doubt that the reservation in a patent of the bishop's jurisdiction in the case of criminous clerks is valid; but the present suit is not within that reservation, but is a civil suit to compel churchwardens to remove illegal ornaments from a church. The fact that a bishop can be compelled by mandamus to appoint a Chancellor—*Ex parte Medwin* (1)—tells to a certain extent against the validity of such a reservation, as shewing that by the common law the personal jurisdiction of the bishop has become curtailed, and, at any rate with regard to some matters, can only be exercised through his Chancellor: see also *Hillyer* v. *Milligan*. (2) There are no patents in existence earlier than the sixteenth century. Patents in the form in question appear to date from the seventeenth century. There was a series of canons sought to be made in the reign of Charles I. which were abortive, being annulled by 13 Car. 2, c. 12, s. 5. The 11th of these Canons of 1640 directed "that hereafter no bishop shall grant any patent to any Chancellour . . . . otherwise than with express reservation to himself and his successors of the power to execute the said place, either alone, or with the Chancellour, if the bishop shall please to do

(1) 1 E. & B. 609. (2) (1754) 2 Lee, 8.

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the same." It seems probable that the forms of patents in use in certain dioceses, which contain reservations of the bishop's jurisdiction, originated under that canon, and that, those forms having been once adopted, they continued to be used as precedents, although the reservation had no legal effect. The form of patent that is most common does not contain this reservation. Most of the reservations in these patents relate not to litigious, but to administrative matters, and there is only one other diocese—that of Ely—in which the patent is in the same form as the one in question (see Report of the Ecclesiastical Courts Commission, 1883). Coke, in 4 Institutes, p. 337, in treating of Consistory Courts, says: "The consistory court of every archbishop and bishop of every dioces in ecclesiasticall causes is holden before his chancelour in his cathedrall church, or before his commissary in places of the dioces far remote and distant from the bishop's consistory." The author says nothing about the bishop himself sitting, and that in a chapter purporting to deal generally with Ecclesiastical Courts. Again, in Ayliffe's Parergon, p. 161, it is said that a chancellor is a vicar-general to the bishop to all intents and purposes of law, "for the bishop himself, according to the common law, cannot be a judge in his own Consistory, but in some particular cases." This view is supported by passages in Godolphin's Repertorium, p. 81; Selden's Table Talk, ed. 1892, issued by the Clarendon Press, p. 32; and 2 Gibson's Codex, ed. 1761, p. 986. The decision in *Boyd* v. *Phillpotts* (1) had nothing to do with the point now under discussion. That case did not relate to the exercise of jurisdiction in the bishop's Consistory Court, but to the bishop's power of visitation in his cathedral. Again, the case of *Bishop of St. David's* v. *Lucy* (2) also had nothing to do with the bishop's Consistory Court, but related to the power of the archbishop to try a bishop. It would have been a very serious matter in former days if such a reservation were valid, for the bishop's Court then had jurisdiction in matters of probate and divorce, and, if the reservation were valid, a party could crave the judgment of a bishop personally in a suit involving matters of law requiring

(1) L. R. 4 A. & E. 297. (2) 1 Salk. 134; 3 Salk. 90.

the trained intellect and knowledge of a professional lawyer. It is, to say the least, so doubtful whether such a reservation is valid, that the Court ought not to interfere by prohibition to give effect to it. It is clear that all the reservations in patents now in use cannot be treated as valid, for the powers to which some of them refer could not be exercised—such, for instance, as the power to deal with wills: *Middleton* v. *Crofts* (1); *Phillimore* v. *Machon*. (2)

Duke, K.C., in reply.

March 10. COLLINS M.R. read the following judgment:—This is an appeal from a decision of the Divisional Court discharging a rule nisi for a prohibition, obtained by the Rev. Mr. Hinde and others, prohibiting the defendants, Dr. Tristram and Mr. Davey, from proceeding further in a certain suit instituted in the Consistorial Court of the Bishop of Chichester, in which Mr. Davey was the petitioner and the Rev. Mr. Hinde and others were respondents, and of which Court Dr. Tristram is the official principal.

Dr. Tristram holds his appointment as Vicar-General in spirituals and official principal of the Consistory Court of the Bishop of Chichester under a patent from the bishop; and the question is whether, having regard to the terms of that patent, Dr. Tristram had jurisdiction to hear and determine the case.

The patent confers jurisdiction in the following terms: "Moreover we do for us and our successors give, grant, and confirm unto the said Thomas Hutchinson Tristram during his natural life, that in our absence from our Consistory Court of Lewes he shall and may proceed by himself, his assignee or substitute, assignees or substitutes, as well in all and singular causes, businesses, suits, and complaints, spiritual and ecclesiastical, at the instance or promotion of whatsoever parties as by our mere and mixed office; also in all causes of dilapidation of the goods of the Church and robbing of churches, and in all other businesses and causes whatsoever (except hereafter excepted)"—the exceptions are not material in this case—"in our episcopal Consistory Court of Lewes moved or to be moved

(1) (1736) 2 Atk. 650. (2) (1876) 1 P. D. 481.

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the cognizance and decision whereof is known by law or custom of the realm to belong to our Ecclesiastical Court, and to decide and finally determine all and singular those the causes aforesaid (except hereafter excepted), with all the rights thereto incident issuing, depending, annexed, and connexed, without breach of the laws and statutes of this excellent kingdom. Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment."

The respondents in the suit, in paragraph 5 of their answer, pleaded "that before any decision or final determination of the cause aforesaid the Right Reverend Father in God, Ernest Roland, by Divine permission Lord Bishop of Chichester, should be first consulted and his consent had, and they earnestly crave his judgment in the premises, and humbly complain and supplicate that the said Lord Bishop should examine and determine the said cause in his own proper person in this Court."

To this paragraph the petitioner in paragraph 4 of his reply "submits that the consent of the Right Reverend the Lord Bishop of Chichester prayed for by paragraph 5 of the respondents' answer is not necessary to the hearing and determination of this cause, and humbly supplicates that the said cause may be examined and determined by the Worshipful Thomas Hutchinson Tristram, Doctor of Laws, the official principal of this Court."

The point was again raised by counsel for the respondents at the hearing before Dr. Tristram (see *Davey* v. *Hinde* (1)), who nevertheless proceeded with the hearing of the case, and, after the determination of another preliminary point made by the respondents, delivered judgment on August 21, 1900, holding that he had jurisdiction (2) and dealing with the merits of the case. Though the fact was not and could not be averred on the face of the proceedings, it is clear from Dr. Tristram's judgment that he did not consult the bishop or obtain his consent either to his hearing the case or to the terms of his judgment.

The question is whether the qualification contained in the concluding words in the grant of jurisdiction above set out

(1) [1901] P. 95.

(2) See note, p. 837.—F. P.

deprived Dr. Tristram of the right to determine the case without first consulting the bishop and obtaining his consent, the respondents having earnestly craved the bishop's personal judgment.

The case was argued and decided in the Divisional Court only on the grounds (1.) that, assuming the qualification in the patent to be valid in point of law, it went to procedure only, and not to jurisdiction, and (2.) that in any view the objection was not sufficiently raised on the face of the proceedings to entitle the respondents, the now appellants, to apply for prohibition.

Before us the additional point was made and argued that the qualification in the patent was itself illegal and nugatory.

First, then, with respect to the grounds on which the case was decided in the Court below. Does the limitation or qualification in the grant go to the jurisdiction, or is consultation with the bishop a mere matter of procedure not affecting jurisdiction, as the Court below held? On the hypothesis that the patent is valid, the Chancellor takes no jurisdiction but that which it confers. He is a delegate, and is bound by the terms of the instrument of delegation. Two constructions have been put upon the limiting words; but in either view it seems to me that they go to jurisdiction, and that under the patent the grantee does not acquire jurisdiction to determine the case when either party craves the bishop's judgment, unless the bishop has been consulted and has consented. It seems to me that the clause, read in its context, has the effect of shutting out from the jurisdiction of the Chancellor such cases unless he has consulted and obtained the consent of the bishop to his entertaining them. I think the word "nevertheless" at the beginning of the clause, coming as it does after a general delegation of authority, points to an exclusion from the jurisdiction of a certain class of cases, unless the bishop has after consultation consented to his grantee entertaining them. Without such consent there is no grant of jurisdiction at all. But, even if the construction of the clause is that adopted in the Divisional Court by Darling J. and, I think also, though I am not quite sure, by Channell J., it seems to me that it also goes to

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jurisdiction. They treat it—the consultation and consent—as having regard to the judgment only and not to the entertaining of the case; but they did not and could not ignore the fact that the clause does require consultation with the bishop and his consent to the judgment to be given. If this is the true meaning of the clause it seems to me that the judgment given in such a case, without consultation and without the consent of the bishop, would be a judgment given without jurisdiction. It is a condition precedent to the right of the grantee to give judgment, and unless he fulfils the condition he exceeds his jurisdiction in pronouncing judgment.

It was, however, argued that the objection to jurisdiction had been waived, and that whether it had been waived or not it was not sufficiently raised on the face of the proceedings to justify the appellants in asking for a prohibition. Mr. Dibdin did not insist upon waiver in the ordinary sense, as being capable of founding jurisdiction, but he urged that in truth and in fact the now appellants had shewn by their conduct of the case that they did not earnestly crave the bishop's judgment, and that in that sense the objection to jurisdiction must be taken to have been waived. I can see no ground whatever for saying that the appellants ever receded from the position which they took up in their pleadings. They there formulated a demand for the bishop's personal intervention; they took the point at the trial; they never receded from it, and the learned judge obviously did not consider that they had abandoned it, for in his judgment given in August he discusses and deals with it. It is true that they had, in the meantime, raised another preliminary point, as to the locus standi of the petitioner, which was decided against them, the learned judge holding over his judgment until that point was determined. But these facts seem to me to afford no evidence whatever that the appellants had ceased to desire the bishop's judgment; nor could they know, nor were they bound to anticipate, that, in his judgment so given, the learned judge would, from their point of view, exceed his jurisdiction. There is clear authority that the right to ask for prohibition, if not otherwise defective, still remains open to them. "For till sentence be given," says Lord Ellenborough

in *Gould* v. *Gapper* (1), "the Courts of common law have no reason to suppose that the Ecclesiastical Court will determine wrong; which, however, if it should do, it is not too late to come then, that is, after sentence, for a prohibition; for the sentence is in such case the gravamen; and so it was expressly stated to be by Holt C.J. and the Court in *Shotter* v. *Friend*." (2)

As to the objection not appearing on the face of the proceedings, I think it was sufficiently apparent to take them out of the principle on which Courts act in refusing prohibition on that ground, which is really one not letting in jurisdiction, but going only to the discretion of the Court in granting prohibition in cases where there was in fact no jurisdiction. The rule laid down in the memorable judgment of the late Willes J. in the case of *Mayor of London* v. *Cox* (3), which has been frequently followed, is really limited to cases where a party has allowed a Court to proceed without disclosing his objection and has afterwards come to set aside the proceedings. Its effect is well summarised by Lopes L.J. in *Farquharson* v. *Morgan* (4): "The result of the authorities appears to me to be this: that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that, where the absence or excess of jurisdiction is not apparent on the face of the proceedings, it is discretionary with the Court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled." There is really nothing like laches or misconduct in the present case; on the contrary, the point is sufficiently apparent on the proceedings, and it was taken in Court and never withdrawn. Therefore I am of opinion that the decision of the Divisional Court cannot be supported on the grounds on which they have placed it.

It is, however, necessary to consider the larger question raised by the argument of Mr. Dibdin, namely, that the limitation to the grant in the patent is itself void. This raises an historical question of some interest, but I think the burden

(1) (1804) 5 East, 345, at p. 364.
(2) (1689) 2 Salk. 547.
(3) L. R. 2 H. L. 239.
(4) [1894] 1 Q. B. 552, at p. 559.

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rests on the respondents, and in my judgment they have not satisfied it.

The form of the patent is, from its phraseology and the matters it embraces, obviously of very considerable antiquity. The exact form of this patent appears to be peculiar to the dioceses of Chichester and Ely; but forms reserving the bishop's jurisdiction, in some shape, in cases such as the present, are still in use in sixteen dioceses: see the Report of the Ecclesiastical Courts Commission, 1883; and it has not been suggested that these forms have not all been in use, at all events from 1640 onwards. Mr. Dibdin, indeed, suggested, but he failed to support the suggestion by any authority, that the origin of these reservations of jurisdiction to the bishop was to be found in certain canons, of which Archbishop Laud was said to be the author, and which were promulgated in 1640, but were subsequently, as he said, abrogated by the statute of 13 Car. 2, c. 12, s. 5; in fact, he contended, broadly, that, before those canons were promulgated, the bishop had no jurisdiction whatever in cases of this class, but that the exclusive jurisdiction was in his Chancellor. There is no doubt that a Chancellor may be imposed upon a bishop: see Godolphin, p. 81, quoting Ridley, "Chancellors of dioceses are nigh of as great antiquity as bishops themselves, and are such necessary officers to bishops, that every bishop must of necessity have a Chancellor; and that if any bishop should seem to be so complete within himself, as not to need a Chancellor, yet the archbishop of the province, in case of refusal, may put a Chancellor on him, in that the law presumes the government of a whole diocese, a matter of more weight, than can be well sustained by one person alone; and that although the nomination of the Chancellor is in the bishop, yet his authority is derived from the law . . . . It is most probable that the multiplicity and variety of ecclesiastical causes introduced the use and office of Chancellors originally; for after that Princes had granted to ecclesiastical persons their causes and their consistories, and circumstances varying these causes into a more numerous multiplication, than were capable of being defined by like former Presidents; necessity called for new decisions, and they

for such judges as were experienced in such laws as were adapted to matters of an ecclesiastical cognizance; which would have been too prejudicial an avocation of bishops from the exercise of their more divine function." But that the Chancellor's power, whatever the extent of it, is a delegated power only is clear—see Gibson's Codex, vol. ii. p. 1027, ed. 1713 (1), quoting Stillingfleet: "And the law nowhere determines the bounds of a Chancellour's power as to such acts; nor can it be supposed so to do, since it is but a delegated power, and it is in the right of him that deputes to circumscribe and limit it." In a manuscript in the Public Record Office of 1636–37, apparently drafted by Sir John Lambe, Dean of Arches, and copied in Rothery's Returns, Appendix, p. xxvii., there is this passage: "Note that in all these offices derived from and under the Bishop, the Bishop cannot so graunt his jurisdiction to his Chauncellor Comissary Archdeacon Deane and Chapter, &c., or so abdicate it from himself, but that he also may use the same, not by prohibiting them (unlesse by way of appeale where it lieth to him) but by doing also with them or without them." It was nevertheless suggested by Mr. Dibdin, as I have said, that the reservations of jurisdiction to the bishop, which continue to be found in the patents in use in so many dioceses down to the present day, took their origin from the canon of 1640 (the 11th). But the language of the canon (see it set out in Gibson, p. 1028 (2)) seems to assume an existing power of reservation. And though by 13 Car. 2, c. 12, s. 5, these canons were expressly not confirmed, that statute saves all jurisdiction existing in 1639. If the effect of the Act of 13 Car. 2, c. 12, passed in 1661, was to leave the bishop denuded of all jurisdiction in his Consistorial Court, as Mr. Dibdin's argument assumes, it is certainly very strange to find Lord Holt no more than forty years later asserting the bishop's right to sit there himself, and reiterating the same opinion some years afterwards. In *Bishop of St. David's* v. *Lucy* (3), decided in 1699, he says: "The archbishop . . . . may hold his court where he pleases; and he

(1) Ed. 1761, p. 986.

(2) Ed. 1761, p. 987.

(3) 1 Salk. 134.

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may convene before himself, and sit judge himself; and so may any other bishop, for the power of a chancellor or vicar-general is only delegated in case of the bishop." And in *Gibbons* v. *Bishop of Cloyn* (1), decided in 1706, he says: "As to what is said, that a bishop may sit in his own Court, and that the vicar and he are but one person; it is true, a bishop may sit when he pleases in his own Court, but the Vicar, Chancellor, shall have fees."

In 1853 a patent in the same form as the present, being that in use in the diocese of Chichester, came before the Court of Queen's Bench, consisting of Lord Campbell C.J. and Coleridge and Wightman JJ., in *Ex parte Medwin*. (2) In delivering the considered judgment of the Court, Lord Campbell says: "We desired to look at it (the patent) before we granted or refused a rule. We have now examined it." He then summarises it, and refers to the qualifying clause. He then proceeds (3): "The Court, therefore, is in style the Bishop's Court, as this is the Queen's; and the Chancellor is the bishop's Chancellor, as we are the Queen's judges. By a special provision, at the prayer of the party, the bishop's judgment may be invoked; in which respect the analogy fails. But, where this prayer is not made, the Chancellor, or Official Principal, seems to be an independent Judge: nor is he the less so, because some cases are excepted from his jurisdiction, nor because that jurisdiction ceases, or is suspended, when the bishop is present. If absent, the bishop cannot interfere: the parties are never supposed, by the citation or other proceedings, to be before him; nor is there any appeal from the Chancellor to him." Again, after citing two passages from Ayliffe, he says (4): "This passage is not very accurately expressed; but the meaning is sufficiently clear in one sense. The Chancellor, or the Official, has a delegated power as much as the Commissary; because they equally receive from the Bishop a power which was originally in him, and which originally he might have exercised himself, and probably often did. But it was a power to be exercised in a Court, open to the subjects of the diocese, for the trial of all

(1) Holt. 599, at p. 602.
(2) 1 E. & B. 609.
(3) 1 E. & B. at p. 615.
(4) 1 E. & B. at p. 616.

causes over which he has jurisdiction." This suggestion that they "often did" finds some support in the diary of Cartwright, Bishop of Chester, in the years 1686 and 1687, cited to us by Mr. Duke, as also from some of the cases mentioned in Rothery's Return, though that collection is limited to those cases only which found their way to the Court of Delegates. In his Historical Appendix (I.) to the Report of the Ecclesiastical Courts Commission, 1883, p. 32, Bishop Stubbs says: "The commission of the chancellor or official principal of the bishop differed from that of the official principal of the archbishop, in not necessarily conferring the whole judicial authority of the bishop, who in some instances reserved particular portions of jurisdiction for his own hearing, as is done at the present day." He casts no doubt on the legality of this practice. At page 46, paragraph 3, he says: "The Court of King's Bench, in the case of *Bishop of St. David's* v. *Lucy* (1), held that the commission of chancellor or vicar-general could not be regarded as excluding the archbishop or bishop from sitting in his own Court (Stephens, I., 289). But although this is reasonable as an affirmation of law, it is not easy to adduce instances in which the power has been exercised since the Reformation. It appears, from the Return on the Patents of Official Principals, made for the present Commission, that in several dioceses it is the practice at the present day to reserve to the Bishop himself important sections of judicial work, or a general right to execute in person the offices otherwise deputed." From the references above given it would seem that the power has been in fact occasionally, if not frequently, exercised since the Reformation.

There seems to be no judicial pronouncement to be set against those above cited. The passage at the beginning of Sir G. Lee's judgment (2) does not seem necessarily to involve the question of a reservation in the patent itself. I think, therefore, that it is impossible to hold void a proviso which merely excludes the jurisdiction of the Chancellor in cases where the parties or either of them crave the judgment of the bishop himself unless upon consultation the bishop consents to his

(1) 1 Salk. 134; 3 Salk. 90. (2) *Hillyer* v. *Milligan*, 2 Lee, 8, at p. 14.

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assuming it. The demand of a party and the good sense of the bishop would seem to be sufficient safeguard against abuse. With regard to the form of the rule, we think it would be sufficient if the prohibition went quousque—that is to say, as against Dr. Tristram, until consultation with the bishop and consent by him to the judgment, and as against the other defendant, Mr. Davey, until there has been such consultation and consent, or until the bishop agrees to hear the cause himself.

Romer L.J. has read and agrees with this judgment.

MATHEW L.J. read the following judgment:—I agree with the reasons given by the Master of the Rolls for allowing this appeal.

In the judgment of the Divisional Court it would seem to have been supposed that the bishop was bound in every case by the decision of his Chancellor, that his assent was a ministerial act only, and that the omission of a mere formality was no objection to the Chancellor's authority to pronounce a final judgment. It is difficult to reconcile this view with the language of the patent. The authority conferred upon the Chancellor to decide and finally determine causes is subject to this proviso: "Nevertheless first consulting us and our successors, and having our consent if either party earnestly craves our judgment." The legal construction of the patent would seem to be clear. Before the Chancellor can pronounce his decision, where either party earnestly craves "our judgment," it is for the bishop to determine whether or not he will give his consent.

But it was argued for the petitioner that the patent gave rise to no question of construction. It was said that the terms might be disregarded, because the document should be treated in law as obsolete and illegal. It was pointed out that the bishop was bound by ancient usage to nominate a Chancellor, and it was said that when the appointment was made the bishop was divested of every judicial function, even where, as in the present case, the patent contained express reservations. The bishop, it was contended, was prohibited by law from

interfering with an official who appeared to derive such powers as he possessed from his patent, but who might, nevertheless, repudiate the terms by which he had undertaken to be bound.

No reliable authority was cited in support of this proposition. The law would seem to have been laid down in the contrary sense in the decisions and records which have been fully discussed by the Master of the Rolls. It is clear that patents in analogous forms have been long in use in many of the English dioceses, and the instrument in question was considered in the Court of Queen's Bench in the case of *Ex parte Medwin* (1) and was treated as unobjectionable. No reason was given for holding the clause in question to be contrary to public policy, and no ground suggested for the suspicion with which the control retained by the bishop would seem to be regarded. It may be true that the judgments of Chancellors have not in recent times been interfered with, and that litigants have been left to their remedy by appeal; but this does not shew that the form of patent continuously used had become obsolete or invalid. It was next contended that, even if some of the provisions of the patent were lawful and binding, the particular clause relied on in support of this appeal was illegal and had been condemned by the Legislature. To establish this the Canons of 1640 were referred to, and it was suggested that then, for the first time, it was declared by Convocation that the bishop might reserve to himself the right to examine and determine every cause in his Court. These canons were promptly condemned by the Long Parliament, and were treated as being subversive of the constitution in matters relating to Church government. It perhaps would be sufficient to dispose of this argument to point out that the clause we are dealing with was not that provided for the canon of 1640. But there is the further answer that there would seem to be no good ground for the assertion that the general reservation which is found in this patent "to examine and determine every cause in our proper person in our Court of Consistory" was intended to be stamped by Parliament with illegality.

The statute of 13 Car. 2, c. 12, recited the Act of 17 Car. 1,

(1) 1 E. & B. 609.

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and by s. 2 repealed all the provisions with the temporary exception of what concerned the High Commission Court. Sect. 2 is as follows: "And be it further enacted by the authoritie aforesaid that the afore recited Act of decimo septimo Caroli and all matters and clauses therein conteined (excepting what concernes the High Commission Court, or the new erection of some such like court by commission) shall be and is hereby repealed to all intents and purposes whatsoever any thing clause or sentence in the said Act contained to the contrary notwithstanding"; and s. 5 is: "Provided alwaies that this Act or any thing therein contained shall not extend or be construed to extend to give unto any archbishop bishop or any other spirituall or ecclesiasticall judge officer or other person or persons aforesaid any power or authority to exercise execute inflict or determine any ecclesiasticall jurisdiction censure or coertion which they might not by lawe have done before the yeare of our Lord one thousand six hundred and thirty-nine nor to abridge or diminish the Kings Majesties supremacy in ecclesiasticall matters and affaires nor to confirm the canons made in the yeare one thousand six hundred and forty nor any of them nor any other ecclesiasticall lawes or canons not formerly confirmed allowed or enacted by Parliament or by the established lawes of the land as they stood in the yeare of the Lord one thousand six hundred thirty and nine."

It has not been shewn that the reservation of causes from the Chancellor's jurisdiction has been condemned or even questioned in any decision of the Courts of common law; and the fact that so many patents still contain a similar clause would seem to shew that in this respect the forms in use before 1639 continued to be followed.

Another point made for the respondents was this: that no effect could be given to the clause which permitted the litigant in the Consistory Court to crave the judgment of the bishop, because it was not pointed out by what method or to what extent inquiries were to be made by the bishop before he consented to adopt or to differ from the judgment of the Chancellor. But no such directions would seem to be required. It would be the duty of the bishop to obtain all necessary information;

and there would seem to be no reason to suppose that the duty would be neglected. Moreover, it should be borne in mind that the determination of the bishop would be subject to appeal.

A further point was made for the petitioner that, even if the patent must be regarded as valid and binding, the respondents in the suit had so acted in the course of the litigation as to shew that they had abandoned their earnest craving for the judgment of the bishop.

In the fifth paragraph of the answer the respondents raise the point and pray "that before any decision of the cause the bishop should be consulted and his consent had," and they earnestly craved his judgment.

In the reply the petitioner objected to the bishop being consulted or to his sitting to try the cause.

It appears from the report of *Davey* v. *Hinde* (1) that the point was argued, and the Chancellor dealt with it at some length in his judgment. There was no evidence that the appellants so acted as to indicate that their objection was abandoned.

But reliance was placed on the delay which it was said had taken place before the application was made for a prohibition. The facts were these. A question had been raised as to the right of the petitioner to institute proceedings, and that point was decided in his favour. The judgment was suspended pending an appeal to the Court of Arches. The appeal was subsequently abandoned, and the Chancellor, in August, 1900, proceeded to judgment; and in the following term prohibition was applied for. The delay was thus fully explained. I agree that the appeal should be allowed, and the prohibition issued in the terms suggested by the Master of the Rolls.

Appeal allowed.

Solicitors for prosecutors: *Brooks, Jenkins & Co.*

Solicitor for defendants: *Grantham R. Dodd.*

(1) [1901] P. 95.

NOTE.—We are informed that Dr. Tristram did not intend to decide any question as to his own jurisdiction, see [1901] P. 122. The order he made was not to issue till some day in November to be named in the order, so as to give time to the respondents before it was completed to move for a prohibition or mandamus.—F. P.

A. M.

C. A.
1902
March 1, 24;
April 8.

[IN THE COURT OF APPEAL.]

NEALE *v.* LADY GORDON LENNOX.

Practice—Counsel's Authority—Compromise of Action—Agreement to Refer—Authority exceeded by Counsel—Limitation of Counsel's Authority unknown to other Side—Interlocutory Order—Absence of Mistake.

The plaintiff in an action for slander authorized her counsel to agree to a reference of the action, but only on condition that the defendant made a statement disclaiming all imputations upon the plaintiff's character. This limitation of the ostensible authority of the plaintiff's counsel was not communicated to the other side. The plaintiff's counsel agreed to a reference of the action without any statement disclaiming imputations by the defendant, and, when the case was called on for trial, an order for a reference was accordingly made. In assenting to the reference, plaintiff's counsel acted under no mistake or misapprehension as to the extent of the authority actually given to him:—

Held, reversing the decision of the Lord Chief Justice, that in such a case the same principle applied to a compromise of an action resulting in an interlocutory order as would apply to a compromise which resulted in a final order; and that, the limitation of counsel's ostensible authority having been unknown to the other side, the mere fact that the plaintiff's counsel had, in agreeing to the reference, exceeded the authority actually given to him did not, in the absence of mistake or anything analogous thereto, afford any ground for setting aside the order of reference.

Application to the Lord Chief Justice to rescind an order made by him as after mentioned.

The action was for slander and libel, the plaintiff and defendant being relatives. The defence pleaded was, in substance, that the defendant did not make the defamatory statements complained of by the plaintiff. When the case came into the list for trial before the Lord Chief Justice on February 12, shortly before the case was called on, he intimated to the counsel for the parties that in his opinion it was very desirable under the circumstances, and having regard to the relationship between the parties, that the case should not be discussed in public. Sir Edward Clarke, who was the leading counsel for the plaintiff, with a view to some arrangement for dealing with

the case out of Court, drew up a note of alternative terms for reference of the case, which was as follows:—

"Defendant stating by her counsel that she never imputed, or meant to impute, anything against the moral character of the plaintiff, and is satisfied that there is no ground for any such imputation:

"Case referred to to say what should be done between the parties in satisfaction of all matters in difference between them:

"Case referred to to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action:

"I consent to either alternative Sir E. Clarke adopts." This note was signed by the plaintiff.

Upon the suggestion made by the Lord Chief Justice, a discussion with a view to a reference of the case took place between Sir E. Clarke and Mr. Isaacs, K.C., who was the leading counsel for the defendant, the former desiring that it should be stated that no imputations of any kind rested on the plaintiff, but the latter, though willing to disclaim on the defendant's part any imputations on the plaintiff with regard to the matters involved in the action, not being willing to make a statement in such wide terms as desired by Sir E. Clarke, on the ground that it might prejudice the defendant's case on the reference with regard to certain minor matters. It was then agreed that counsel should go before the Lord Chief Justice in his private room to discuss the matter, which they accordingly did, with the result that ultimately it was agreed, with the sanction of the Lord Chief Justice, who was not aware of any limitation of the plaintiff's counsel's authority, that the record should be withdrawn, and the action referred to Mr. Dickens, K.C., but without any statement disclaiming imputations on the plaintiff. It was subsequently stated in Court, in the presence of the plaintiff, that the case was referred to Mr. Dickens, K.C., and no disclaimer of imputations was then made. The plaintiff immediately afterwards, and before the order for reference was drawn up, communicated with her solicitor, and instructed him to see Sir E. Clarke with regard

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to the case having been referred without a statement that all imputations were withdrawn. On February 14 the plaintiff had an interview with Sir E. Clarke on the subject, and, in consequence of what then took place, on February 17 he made an application to the Lord Chief Justice that the order of reference should be set aside and the case should be restored to the list upon affidavits, the effect of which is stated in the judgment of the Lord Chief Justice. The Lord Chief Justice directed the matter to be argued before him, and it came on for argument accordingly.

March 1. *Sir E. Clarke, K.C.*, and *R. J. Drake*, for the plaintiff. The plaintiff gave specific instructions to her counsel as to the terms upon which she would agree to a reference of the case, and her counsel agreed to this order contrary to the express instructions of his client. The plaintiff has not done anything to ratify or adopt the agreement made by her counsel, but as soon as possible repudiated the arrangement, and applied to have the action restored for trial. There is no case in which it has been expressly decided that the client is bound by an agreement made by his counsel contrary to his express instructions. In all the decided cases the client had either left himself in the hands of his counsel or had put himself in such a position that his counsel had to exercise his discretion: *Swinfen* v. *Swinfen* (1); *Strauss* v. *Francis* (2); *Matthews* v. *Munster* (3); *Kempshall* v. *Holland.* (4) If an order is agreed to by counsel acting under a misapprehension, the client will not be bound by it, and a fortiori, if counsel has acted contrary to his express instructions, and comes to the Court, and says so, the arrangement made by counsel ought not to be held to bind the client: *Holt* v. *Jesse* (5); *Hickman* v. *Berens* (6); *Lewis's* v. *Lewis.* (7) The result of the authorities is that counsel has a general authority to deal with the conduct of an action, which includes authority to compromise an action

(1) (1857) 1 C. B. (N.S.) 364.
(2) (1866) L. R. 1 Q. B. 379.
(3) (1887) 20 Q. B. D. 141.
(4) (1895) 14 R. 336.
(5) (1876) 3 Ch. D. 177.
(6) [1895] 2 Ch. 638.
(7) (1890) 45 Ch. D. 281.

upon any terms which he thinks right, but that, if counsel under a misapprehension enters into an agreement which his client repudiates, the Court will not enforce the agreement. The present case is even stronger, and nothing has happened to affect the position of the other party if the action is restored for trial.

Rufus Isaacs, K.C., and *Norman Craig*, for the defendant. Counsel has primâ facie general authority to deal with the action in any way, including authority to agree to a reference. If any limitation is put upon that authority by the client, that limitation must be brought to the knowledge of the other party, otherwise the other party is entitled to assume that the general authority exists and to act upon that assumption, and the Court will never set aside a compromise made under that apparent general authority: *Strauss* v. *Francis* (1); *Prestwich* v. *Poley* (2); *Wright* v. *Soresby* (3); *Fray* v. *Voules*. (4) It makes no difference that the order to which counsel has agreed is an interlocutory order; there is no distinction for this purpose between final and interlocutory orders: *Strauss* v. *Francis* (1); *Swinfen* v. *Lord Chelmsford*. (5) This was in fact a final order because the record was to be withdrawn.

Sir E. Clarke, K.C., in reply. This was an interlocutory order, and the defendant will not have been in any way prejudiced if the action is restored for trial. Before an order has been drawn up the Court has a general jurisdiction to deal with it: *Ainsworth* v. *Wilding* (6); *Mullins* v. *Howell*. (7)

Cur. adv. vult.

March 4. LORD ALVERSTONE C.J. read the following judgment:—This is an application to rescind the order of reference of the action to Mr. Dickens, to which the parties consented through their counsel on February 12, and which consent was subsequently embodied in an order of February 17.

It appears in the affidavits which have now been produced,

(1) L. R. 1 Q. B. 379.
(2) (1865) 18 C. B. (N.S.) 806.
(3) (1834) 2 C. & M. 671; 39 R. R. 876.
(4) (1859) 1 E. & E. 839.
(5) (1860) 5 H. & N. 890.
(6) [1896] 1 Ch. 673.
(7) (1879) 11 Ch. D. 763.

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and the documents which have been handed to me by Sir Edward Clarke, that, prior to the consent given by counsel, the plaintiff had signed a document, which had been drawn up by Sir Edward Clarke, and which was in the following terms: "Defendant stating by her counsel that she never imputed, or meant to impute, anything against the moral character of the plaintiff, and is satisfied that there is no ground for any such imputation: Case referred to to say what should be done between the parties in satisfaction of all matters in difference between them: Case referred to to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action. I consent to either alternative Sir E. Clarke adopts." This was dated February 12.

If the matter had rested there, it would in my opinion have been impossible to hold that any restraint was actually put upon Sir E. Clarke's discretion in dealing with the case; but the plaintiff swears in her affidavit made upon February 17 that, after consultation with her counsel, whom I understand to have been Sir E. Clarke's junior, she consented to the reference on the understanding that the defendant admitted in Court by her counsel that the plaintiff's character was exonerated, and that no imputation was to rest upon it. I must take it that this statement in the affidavit was true. It further appears from the affidavits that, immediately after it was announced in Court that the action was referred, the plaintiff communicated with her solicitor, and instructed him to see Sir E. Clarke with reference to the case being referred without such statement having been made, and that on the 14th the plaintiff had a consultation with Sir E. Clarke which led to the application being made to me upon Monday the 17th. Under these circumstances I come to the conclusion as a matter of fact that the plaintiff had only consented to the action being referred upon the condition that the statement was made, and did, before the order was drawn up, communicate with her counsel and solicitor with a view to the arrangement being set aside and the case restored to the list. The case was argued before me on Saturday last by Sir E. Clarke

for the plaintiff, and Mr. Rufus Isaacs for the defendant, and a great many authorities bearing upon the question were cited and discussed before me. I do not propose to go through all these cases, as my so doing would serve no useful purpose; but I will state what in my opinion are the propositions of law to be derived from them, and then consider their bearing upon the present case.

I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement, and further that, notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side. These propositions are, I think, established by the cases of *Wright* v. *Soresby* (1); *Prestwich* v. *Poley* (2); *Strauss* v. *Francis* (3); *Matthews* v. *Munster* (4), and stated to be clear law by Lord Coleridge C.J. in *Harvey* v. *Croydon Union Rural Sanitary Authority*. (5) It is equally well established that the authority of counsel does not extend to matters collateral to the action: see *Furnival* v. *Bogle* (6), the various reports in *Swinfen* v. *Swinfen* (7); *Kempshall* v. *Holland* (8); *Matthews* v. *Munster*. (4) Whether agreeing to a reference of an action is part of the conduct of a case and not collateral may possibly be questioned. Crowder J. clearly thought it was not within the authority of counsel, in his judgment in *Swinfen* v. *Swinfen* (9); but I doubt whether this opinion is consistent with the view expressed by Pollock C.B. in *Swinfen* v. *Lord Chelmsford* (10), or with the judgments in *Strauss* v. *Francis* (3), where withdrawing a juror, or *Rumsey* v. *King* (11), where entering a stet processus, was held to be within the authority of counsel. Sir E. Clarke said he would not argue that the agreeing to a

(1) 2 C. & M. 671; 39 R. R. 876.
(2) 18 C. B. (N.S.) 806.
(3) L. R. 1 Q. B. 379.
(4) 20 Q. B. D. 141.
(5) (1884) 26 Ch. D. 249, at p. 256.
(6) (1827) 4 Russ. 142; 28 R. R. 34.
(7) 1 C. B. (N.S.) 364.
(8) 14 R. 336.
(9) 1 C. B. (N.S.) 364, at p. 403.
(10) 5 H. & N. 890, at p. 922.
(11) (1876) 33 L. T. 728.

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reference was collateral to the action; and for myself I should hold that, having regard to the existing rules and the power of judges thereunder to refer actions or send them to referees for trial, it was within the authority of counsel to consent to a reference.

It is further clearly established that, if the counsel consenting to a compromise is mistaken as to the facts, the client may have the right to set aside the arrangement on the ground of mistake: see *Holt* v. *Jesse* (1); *Hickman* v. *Berens* (2); *Wilding* v. *Sanderson*. (3) There is, however, as far as I know, no case which has decided that the compromise will be set aside merely on the ground that the counsel has exceeded his authority, and, as I have already indicated, such a view would, in my opinion, be inconsistent with the first proposition which I have formulated, and the cases there referred to. If, therefore, the arrangement come to by Sir E. Clarke had been a final settlement of the action, I am of opinion that it would be binding upon the plaintiff even assuming that she had limited Sir E. Clarke's authority at the time when he entered into the arrangement.

None, however, of the authorities to which I have referred, in which the compromise or arrangement has been held binding upon the client, were cases of interlocutory orders, and in my judgment, in considering the principles which have been and ought to be applied, there is a broad distinction between interlocutory and final orders. This distinction has often been pointed out: see the judgment of Jessel M.R. in *Mullins* v. *Howell* (4), and also the judgment of Romer J. in *Ainsworth* v. *Wilding*. (5) There is in my opinion a fundamental difference between interlocutory and final orders as well as between interlocutory and final judgments. Interlocutory orders and judgments are only intended to affect the rights of the parties in the litigation. They are always subject to review when fresh facts are brought to the consideration of the Court. Judgments passed and entered stand in a very different position.

(1) 3 Ch. D. 177.
(2) [1895] 2 Ch. 638.
(3) [1897] 2 Ch. 534.
(4) 11 Ch. D. 763, at p. 766.
(5) [1896] 1 Ch. 673, at p. 677.

In the case of an interlocutory order it is generally possible to restore parties to their original position by payment of costs or otherwise; final orders are intended to, and do as a rule, determine the rights of the parties. Perhaps I should add, in deference to an argument of Mr. Isaacs, that I am clearly of opinion that an order to refer an action is an interlocutory and not a final order: see the authorities collected at p. 842, vol. i. and p. 507, vol. ii. of the Annual Practice.

I cannot help feeling regret that the plaintiff has thought fit to make the present application. The arrangement which was made proceeded from a suggestion made in the first instance by me, and was, I believe, greatly to her advantage. Sir Edward Clarke, in my opinion, had ample reason to think that he was not exceeding his authority at the time his consent was given, and has, with the chivalry which he has always shewn in every act of his professional and public life, taken too large a responsibility for the mistake, if mistake there has been. But, holding as I do that this was an interlocutory order, that it was in fact made without the plaintiff's authority, and that she took steps to set aside the arrangement before the order was drawn up, I am of opinion that I must reverse the order and restore the case to the jury list. The plaintiff must pay the costs of and occasioned by the postponement of the case, including the costs of these applications in any event.

J. F. C.

The defendant appealed.

March 24; April 8. *Rufus Isaacs, K.C.*, and *Norman Craig*, for the defendant. Upon the authorities cited by the Lord Chief Justice it is clear, and he himself held, that, if this had been a final order, it could not have been set aside. The proposition which is the result of the authorities is that counsel representing a party to an action has a general authority to act for his client in all matters relating to the conduct or settlement of the action, including authority to consent to a reference, and that any limitation of that authority by the client is ineffectual, unless communicated to the other side. The Lord Chief Justice held that, because the order in this

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case was interlocutory, that proposition did not apply, and the order might be set aside, merely because counsel had exceeded the authority actually given by his client, although no notice was given to the other side of the limitation of his authority. It is submitted that there is no authority for the distinction so drawn by the Lord Chief Justice between final and interlocutory orders, and that on principle it cannot be supported. For the purposes of the present case there is no distinction between a final and an interlocutory order. The cases shew that an order giving effect to an agreement to settle an action may be set aside on the ground that the agreement was made under a mistake, and there is authority for saying, in the case of an order made on an interlocutory application by consent, that the Court may set it aside on the ground that it was made under a mistake, though that mistake was on one side only: *Mullins* v. *Howell* (1); *Ainsworth* v. *Wilding*. (2) In some of these cases of mistake the decision may be explained on the ground that there really was no agreement because the parties were not ad idem. But, in the present case, there is, admittedly, no question of mistake. The sole ground for setting aside the order is the limitation of the plaintiff's counsel's authority, which was unknown to the defendant. On principle and authority that is no ground for setting aside an interlocutory order giving effect to a compromise, any more than it would have been a ground for setting aside the order, if it had been final. It is submitted that the order in this case is not really interlocutory within the meaning of the distinction that has been drawn in cases such as *Mullins* v. *Howell* (1) and *Ainsworth* v. *Wilding*. (2) Those cases only related to matter of procedure, and no question arose therein as to the authority of counsel. They shew that there is this distinction between final orders by consent and interlocutory orders by consent, namely, that, in the case of a final order made by consent, as a rule, the only mode of setting it aside is by action, whereas an interlocutory order by consent, if proper grounds exist, may be set aside on interlocutory application. But the distinction so drawn has no bearing upon the question involved

(1) 11 Ch. D. 763. (2) [1896] 1 Ch. 673.

in the present case. What Jessel M.R. said in *Mullins* v. *Howell* (1), as to the Court having a sort of general control over orders made on interlocutory applications, may have been right enough with regard to the subject-matter of that case, which was an application to enforce an order for a mandatory injunction consented to by mistake, but it does not mean that the Court in such a case as the present is not bound by the rules of law with regard to the authority of an agent to bind his principal. [They cited *Wright* v. *Soresby* (2); *Swinfen* v. *Swinfen* (3); *Strauss* v. *Francis* (4); *Matthews* v. *Munster* (5); *Kempshall* v. *Holland* (6); *Filmer* v. *Delber* (7); *Smith* v. *Troup* (8); *Faviell* v. *Eastern Counties Ry. Co.* (9)] It is submitted that the authority of Sir E. Clarke was not in fact limited as suggested. The terms of the document signed by the plaintiff do not necessarily involve such a limitation. Anything said by the plaintiff to her junior counsel, not communicated to his leader, cannot have the effect of limiting the authority given to the latter.

Sir E. Clarke, K.C. (*R. J. Drake* with him), for the plaintiff. The necessary effect of the document signed by the plaintiff was to limit the authority of plaintiff's counsel to consent to a reference by the condition that a disclaimer of imputations must be made by the defendant. It must be admitted that the plaintiff's counsel did not agree to the compromise which was made under any mistake or misapprehension as to the extent of his authority; and therefore it was wrong for him to agree to it. It is not disputed that, if he had done so under a mistake or misapprehension as to the extent of his authority, the Court could, in the case of an interlocutory order, have undone the compromise and set the order aside. But surely it follows that, in the case of such an order, the Court must have jurisdiction, and ought, where counsel admits that he has acted wrongly in assenting to the order, to set it aside,

(1) 11 Ch. D. 763.
(2) 2 C. & M. 671; 39 R. R. 876.
(3) 1 C. B. (N.S.) 364.
(4) L. R. 1 Q. B. 379.
(5) 20 Q. B. D. 141.
(6) 14 R. 336.
(7) (1811) 3 Taunt. 486; 12 R. R. 688.
(8) (1849) 7 C. B. 757.
(9) (1848) 2 Ex. 344.

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when, as in the present case, the other side can be placed in statu quo by the imposition of such terms as to costs and other matters as may be just. The case of *Mullins* v. *Howell* (1) shews that the Court has a general jurisdiction to deal as it may think just with interlocutory orders like that in the present case made in the course of a litigation, and in that case an order made by consent was discharged on the ground that it was made under a mistake by one party only: see also *Lewis's* v. *Lewis*. (2) The fact that counsel has exceeded his authority would seem to be quite as strong a reason for this kind of interlocutory interference as the fact that he has made a mistake as to the extent of his authority. It is contended that the decisions relied on by the defendant do not establish the proposition that the Court have no jurisdiction to set aside an interlocutory order by consent in a case like this. *Wright* v. *Soresby* (3) does not shew that the Court have not jurisdiction in such a case as this to set aside the order, but merely that under the particular circumstances of that case they declined to exercise that jurisdiction because the plaintiff had allowed the compromise to be made without protest. In *Strauss* v. *Francis* (4) it appears very doubtful whether the plaintiff in fact limited the authority of his counsel.

[They also cited on this point *Holt* v. *Jesse* (5); *Hickman* v. *Berens* (6); *Wilding* v. *Sanderson* (7).]

Norman Craig, in reply.

COLLINS M.R. This is an appeal from a decision of the Lord Chief Justice, by which he undid an agreement for the reference of the action, and ordered that the case should be restored to the list for trial. The defendant appeals against that decision on the ground that she is entitled to insist on the compromise, whereby it was agreed that the action should be referred, and the question is whether she is so entitled.

The question arises in this way. Sir E. Clarke, who was

(1) 11 Ch. D. 763.
(2) 45 Ch. D. 281.
(3) 2 C. & M. 671; 39 R. R. 876.
(4) L. R. 1 Q. B. 379.
(5) 3 Ch. D. 177.
(6) [1895] 2 Ch. 638.
(7) [1897] 2 Ch. 534.

counsel for the plaintiff, admits that, in making the compromise, he acted contrary to the instructions of his client, and with characteristic chivalry he has taken upon himself the whole responsibility for what was done. He says that there was no mistake on his part, that there was in point of fact a limitation of his authority by his client, who had instructed him not to agree to a reference except on the condition that all imputations should be disclaimed by the defendant, but that he, nevertheless, made a compromise without that term, and therefore outside the limits of the authority in fact given to him. Under those circumstances the question is whether the defendant is entitled to insist on that compromise as binding. The matter was argued before the Lord Chief Justice; all, or nearly all, the authorities on the subject were discussed during the argument before him; and he has given a judgment in which he formulates the principle which he deduces from the authorities. I have read that judgment, and I find nothing which I desire to qualify, still less to impugn, in his statement of the general principle applicable to such cases. He summarizes the effect of the decisions thus: "I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement; and further that, notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side." He then refers to a number of authorities, which have been cited to us during the argument in this Court, and which clearly support the proposition which he lays down. We therefore start with this, that the counsel for the plaintiff had full authority primâ facie to refer the case, either on the term that all imputations should be disclaimed, or without that term.

The propositions that the power to refer a case to arbitration, and that the power to compromise a case, either with or without the term that all imputations should be withdrawn, are within the general ambit of counsel's authority, appear to me to

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have been established by several cases. It has been held in more than one case that the solicitor employed to conduct an action—and it seems to me that the same principle must apply to counsel—has, as incidental to his position, authority to consent to a reference of the case. It was held, for instance, in *Smith* v. *Troup* (1), that the attorney on the record in an action has authority to consent to a reference on behalf of his client. The Court held, therefore, in that case, though it was stated on affidavit that the client had not assented, but had objected to, the reference of the case, that, nevertheless, the agreement for a reference held good. There are other cases to the same effect, to which I need not refer. It was also decided that counsel has authority to compromise an action in *Matthews* v. *Munster*. (2) In that case, on the trial of an action for malicious prosecution, the defendant's counsel, in the absence of the defendant and without his express authority, consented to a verdict for the plaintiff for 350*l*. upon the understanding that all imputations against the plaintiff were withdrawn, and it was held that this settlement was a matter which was within the apparent general authority of counsel and was binding on the defendant. Therefore the questions, as to which some controversy might otherwise have been raised, namely, whether the general authority of counsel, which is limited to matters relating to the conduct of the action, includes the power to refer the action, and whether it includes the power to compromise the action, appear to be determined by authority.

Then the question is, What is the effect of a limitation upon the general authority of counsel, which has not been communicated to the other side? That question was dealt with in the case of *Strauss* v. *Francis*. (3) Blackburn J. there said: "All we decide is that, when a counsel, acting within his apparent authority, consents to withdraw a juror, the other side, acting fairly, may safely rely on the compromise being binding; and that, in order to invalidate the arrangement, not only must it be shewn that the counsel's authority was limited, but that

(1) 7 C. B. 757. (2) 20 Q. B. D. 141.
(3) L. R. 1 Q. B. 379.

the limitation was known to the other side at the time." I need not refer to the other cases which have affirmed that decision.

Therefore we have here an apparent general authority given to counsel, and a secret limitation of that authority, uncommunicated to the other side, and under these conditions a compromise of the case is effected by counsel, by which it is referred to an arbitrator. It appears that the general authority given to Sir Edward Clarke as counsel had been limited, or, at any rate, he construes the document, which was signed, as limiting it, by a provision that he should only compromise the action by an agreement for a reference on the terms that all imputations against the plaintiff should be disclaimed. If the effect of the document was that there was really such a limitation—and the case has, no doubt, been conducted on the hypothesis that the authority was so limited—it was, as I have said, a secret limitation, unknown to the other side. Under these circumstances the cases appear to me to establish beyond question that the compromise cannot be undone merely because the authority actually given to counsel was exceeded. There was no element of mistake in the present case. Sir E. Clarke has said that there was no mistake or misapprehension on his part. Therefore, whatever may be the doctrine of law with regard to the effect of a unilateral mistake on an agreement to compromise an action, that doctrine has no application in the present case, for here there was no mistake. I cannot very well understand why the Lord Chief Justice, having dealt with the matter as, up to a certain point in his judgment, he did, ultimately came to the conclusion at which he arrived. It seems to me that, up to that point, all that he said, and the principles which he laid down, resulted in the position which he formulated thus: "If, therefore, the arrangement come to by Sir E. Clarke had been a final settlement of the action, I am of opinion that it would be binding upon the plaintiff, even assuming that she had limited Sir E. Clarke's authority at the time when he entered into the arrangement." But the Lord Chief Justice then came to the conclusion that the arrangement was not a final settlement of the action, and that the order

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made was interlocutory, and not final, and, that being so, different principles were let in with regard to undoing a compromise from those which would have been applicable if the order had been final. I cannot find, speaking for myself, any authority to shew that different principles can be invoked in this case, because the order was interlocutory, from those which would have applied in the case of a final order. There appears to be this difference in cases of this kind between an interlocutory order and a final order, namely, that an interlocutory order, being interlocutory, may be undone by another interlocutory order, whereas, a final order being final, the remedy is by action. But the general principles that must govern this matter must, as it appears to me, be exactly the same, the order being interlocutory, as they would have been if it had been final. There being no element of mistake in the present case, I do not think that there is any jurisdiction to undo the compromise on the ground that the order was interlocutory, and, so far as the judgment of the Lord Chief Justice was based on the supposed distinction between a final and an interlocutory order, I do not think it was well founded. That was really the only ground on which he came to the conclusion that the order could be set aside; for all that he said previously to making that distinction, and the principles which he derived from the authorities, appear to me to go to shew that, if this order had been final, it could not have been set aside. For these reasons I think that the appeal must be allowed.

ROMER L.J. I am of the same opinion. It could not be, and was not, disputed that the power to make such a compromise as was made in the present case was within the general authority of counsel engaged in an action; but it was said that, in this case the authority was specially limited in such a manner as not to allow him to make the compromise which he made. I am not altogether satisfied that, under the circumstances of this case, the authority of counsel was in fact limited as suggested, but I will assume that it was so limited. It appears, however, that the limitation of his authority was

not communicated to, or known to the other side. Under these circumstances, it is clear that, as a general rule, such a compromise is binding; and that rule cannot be departed from except on certain definite and well-recognised grounds. There are no doubt cases in which, when counsel has, in making a compromise, disregarded some limitation of his authority, the compromise has been set aside on some such ground as that counsel acted under a mistake or a misapprehension of the effect of his instructions. But there must be some such definite and substantial ground for setting aside the compromise. My difficulty in this case is that I cannot see on what precise ground it is alleged that the compromise ought to be set aside. I cannot find any definite or substantial ground stated for setting it aside. As has been pointed out by the Master of the Rolls, there was in this case no mistake, or misapprehension, on the part of the plaintiff's counsel. He does not, as I understand him, even say that, at the time of making the compromise, he had forgotten the limitation put upon his authority. The case appears to amount only to this: counsel, under no mistake or misapprehension as to the extent of the authority in fact given to him, makes a compromise which he thinks at the time beneficial to his client, but which he was not in fact authorized to make; afterwards the client objects to the compromise; and, that being so, counsel regrets that he has made it. But this state of affairs does not justify the counsel or his client in asking the Court to set aside the compromise which was arrived at, if the other side insists upon it. As I have said, there is no ground, so far as I can see, upon which the Court can be asked to set aside the compromise in this case. I do not see how, under these circumstances, it makes any difference whether the order giving effect to the compromise is final or interlocutory. The only difference that can make seems to me to be that, if there be a proper ground for setting aside a compromise, it is easier to do so where the compromise is by way of an interlocutory order than where it results in a final order, in the following respect. Where a compromise results in the entering up of a final order, giving effect to it, at the trial, it has been held in many cases that

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Romer L.J.

the effect of that compromise cannot be undone except by bringing an action, but, where the compromise is by way of an interlocutory order, then, as a rule, the order can be set aside on motion, if a proper ground for setting it aside exists, without the necessity for bringing an action; though, even in the case of an interlocutory order, if the circumstances of the case be such as to involve a conflict of evidence as to the facts, or to make cross-examination of witnesses desirable, the Court may refuse to set aside the compromise on motion, and leave the party seeking to undo it to bring an action. There is in this case, as it seems to me, nothing by way of ground for undoing the compromise, on which the plaintiff would have been entitled to rely in an action, if the order had been final, or on which she is entitled to rely on an interlocutory application, the order being interlocutory. In either case there must be some definite well-recognised ground for undoing the compromise, such as mistake, and no such ground appears to me to exist in the present case.

MATHEW L.J. I am of the same opinion. The Lord Chief Justice at the end of his judgment points out the ground of his decision thus. He says: "Holding as I do that this was an interlocutory order, that it was in fact made without the plaintiff's authority, and that she took steps to set aside the arrangement before the order was drawn up, I am of opinion that I must reverse the order, and restore the case to the jury list." I am unable to agree with the Lord Chief Justice in the view that the mere fact that the authority of the plaintiff's counsel had been limited, and that the compromise was made without actual authority from the plaintiff, was sufficient ground for the decision at which he arrived. There appears to be ground for saying that, with reference to some compromises, the Court will exercise a peculiar jurisdiction, and will interfere to set them aside where there has been a mistake on one side only, but no decision has been cited to shew that the Court has ever interfered with compromises except in cases of mistake or analogous cases. In this case the plaintiff's counsel admits that there was no mistake on his part, and he does not

say that he had forgotten, at the time when he agreed to the reference, the contents of the document signed by his client. It appears that, thinking that it was very important that the matters involved in the action should not be discussed in public, and that some arrangement for a reference would be very desirable, he had drawn up the document himself. He does not appear to have had any personal communication with the plaintiff on the subject, but she signed the document which he had drawn up, and it was handed to him. I do not feel sure myself that the document did import a limitation of counsel's authority. It states terms on which the plaintiff was willing that the action should be compromised, but it may be questioned whether its terms contain anything to take away from counsel his right to exercise his own judgment as to what course it might be most for his client's interest to adopt. Counsel having gone before the Lord Chief Justice in his room, where the case was discussed between the plaintiff's counsel and the defendant's counsel, who refused to make the disclaimer of imputations mentioned in the document signed by the plaintiff, the plaintiff's counsel, nevertheless, made the compromise which the plaintiff now seeks to have set aside. The scope of the ostensible authority given to counsel employed to conduct an action has been stated by the Lord Chief Justice, and it is clear that in the present case there was no intimation to the other side that the plaintiff's counsel considered that his authority to compromise the action was subject to the limitation now suggested. The case was discussed between counsel on either side, and a settlement arrived at, in the ordinary way, as in any other case where counsel's authority is not subject to any special limitation. Looking at the cases in which the Court has interfered with compromises of this kind, I should be slow to say that there is an absolutely hard and fast rule, distinguishing between final and interlocutory orders, with regard to the procedure for setting them aside. I should be disposed to think that even in the case of a final order the matter might be so clear that the Court would not put the parties to the expense of a separate litigation, in order to get rid of the compromise; and, in the case of an interlocutory

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Mathew L.J.

order, where it is settled practice that the Court will, if proper grounds exist, set aside the compromise summarily on motion, I can see that there might be cases in which the Court might think that there was so much doubt as to what had actually occurred that they ought not to interfere summarily, and leave the party seeking to undo the compromise to proceed by action. In the present case I do not see any ground on which the Court can, consistently with legal principles, be asked, either by action or on summary application, to treat this compromise as invalid. I cannot discern any analogy between this case and one in which there has been a mistake or misapprehension on the part of counsel assenting to a compromise. Agreeing entirely as I do with the judgment of the Lord Chief Justice as to the authority of counsel, I cannot concur in the conclusion that in this case the compromise ought to be set aside on the ground that it was in fact made without the authority of the client.

Appeal allowed.

Solicitor for plaintiff: *W. H. Jamieson.*
Solicitors for defendant: *Lewis & Lewis.*

E. L.

STOKES *v.* MITCHESON.

1902
April 23.

Justices—Dismissal of Information—Case stated on Application of Informant —"Either Party to the Proceeding"—Summary Jurisdiction Act, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 2—"*Any Person aggrieved*"—*Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 33—*Coal Mines Regulation Act*, 1887 (50 *&* 51 *Vict. c.* 58), *ss.* 49, 50—*Agent of Mine—Liability for Contravention of General Rule by Manager.*

By the Summary Jurisdiction Act, 1857, s. 2, after the hearing and determination by justices of any information or complaint "either party to the proceeding" may apply to the justices to state a case; and by the Summary Jurisdiction Act, 1879, s. 33, "any person aggrieved" who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction may apply to the Court to state a special case, and, by sub-s. 2, the Act of 1857 shall, so far as it is applicable, apply to a case stated under this section.

A special case, expressed to have been stated under the later Act only, was stated on the application of an informant, the information having been dismissed. An objection was taken that the appeal could not be heard, on the ground that the informant was not a person aggrieved within s. 33:—

Held, that, having regard to sub-s. 2 of s. 33, the provisions of the two Acts as to stating cases must be read together, and that, the informant being a party to the proceeding, the appeal could be heard.

Quære, whether a prosecutor after an acquittal is a person aggrieved so as to be entitled to apply to the High Court under s. 33 for an order requiring a case to be stated.

The Coal Mines Regulation Act, 1887, after providing by s. 49 general rules to be observed in mines, enacts by s. 50 that, in the event of any contravention of or non-compliance with the rules in the case of any mine to which the Act applies by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the rules as regulations for the working of the mine, to prevent such contravention or non-compliance.

An information was preferred under s. 49 against the agent of a coal mine, in which one of the general rules relating to the ventilation of the mine had not been complied with. The defendant had appointed a duly qualified manager and under-manager, and the non-compliance with the rules, which affected only one heading of the mine and was of a temporary character, was due to their negligence. There was no evidence of personal negligence by the defendant, and the defendant was not called as a witness. The justices found that the defendant had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager, whose duty it was to carry out the rules, and that the violation

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of the rules was in no way caused by the defendant omitting to enforce the rules, and they dismissed the information:—

Held, that there was evidence from which the justices might properly come to that conclusion.

CASE stated by justices for the county of Warwick under the Summary Jurisdiction Act, 1879.

The respondent was charged on the information of the appellant, one of His Majesty's inspectors of mines, which alleged that the respondent, on November 1, 1901, at the parish of Baxterley, in the county of Warwick, being the agent of the Baddesley Mine, the same being a mine within the meaning of the Coal Mines Regulation Act, 1887, unlawfully did fail to cause an adequate amount of ventilation to be constantly produced in the said mine to dilute and render harmless noxious gases to such an extent that the working places, levels, and workings of the said mine would be in a fit state for working therein, contrary to s. 49, rule 1, of the Coal Mines Regulation Act, 1887.

Informations for a similar offence had also been laid against the manager, who held a first class certificate, and against the under-manager, who held a second class certificate, of the mine. The three charges were heard together.

The respondent was admitted to be the agent of the mine within the meaning of the Act.

The evidence for the prosecution consisted only of the evidence of an assistant inspector of mines, and was to the effect that he visited the mine, which was a dry and dusty one, and, therefore, more liable to explosions, on November 1, 1901. He then found an accumulation of gas in a certain heading, No. 29, and no sufficient ventilation, and that no entry of the gas was made in the report book. The non-ventilation of the heading, No. 29, was caused by the temporary diversion of the air-pipes at the entrance thereto into an adjacent heading, which was then being driven. The report book stated that the ventilation was satisfactory, and that there was no gas. The under-manager in evidence stated that he first discovered gas on October 19, and that on that day he fenced the heading off, but not so as to prevent the escape of gas, and reported

the presence of gas to the manager either on October 25 or October 28.

No witnesses were called for the respondent. There was no evidence as to any visits to the mine by the respondent.

The justices convicted the manager and under-manager.

It was contended for the appellant that, if the justices came to the conclusion that a contravention of or non-compliance with the rules existed, the justices were bound to convict the respondent unless he proved that he had taken all reasonable means, by publishing and to the best of his power enforcing the general rules, to prevent such contravention or non-compliance as mentioned in s. 50 of the Act, and that no evidence to that effect had been given by or on behalf of the respondent.

It was contended for the respondent that all the requirements as to publication of the rules had been complied with; that there was a certificated manager and a certificated under-manager, both experienced and acquainted with the rules; and that the non-ventilation of heading No. 29 was due to temporary diversion by the under-manager of the otherwise adequate means of ventilation of such heading.

In deciding the case the following considerations were present to the minds of the justices: (*a*) The manager is the person primarily responsible for the conduct of the mine. (*b*) No evidence was given of personal negligence by the respondent. The evidence shewed that the violation of the rules took place by the personal negligence of the manager and under-manager, who had also failed to enter the cause of the violation in the report book, but, on the contrary, had stated in his report that the mine was free from gas. (*c*) No evidence was given of the publication of the rules, nor was such publication admitted; but the justices considered the respondent had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager, who knew the rules, and whose duty it was to carry out the rules without further interference from him. The violation of the rules, therefore, was in no way caused by the respondent omitting to enforce the rules. (*d*) In the present case, as against the respondent, only an occasional irregularity was proved, and not one which

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had been continuous. The justices, therefore, considered that the charge was not proved against the respondent, and they dismissed it.

The question of law for the opinion of the Court was whether, having regard to s. 50 of the Coal Mines Regulation Act, 1887, the justices were or were not justified upon the evidence before them in dismissing the charge against the respondent.

B. C. Brough, for the respondent. There is a preliminary objection to the hearing of this case. The special case is stated under s. 33 of the Summary Jurisdiction Act, 1879, which provides that "Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction" may apply to the Court to state a special case. The appellant, an inspector of mines, whose information was heard and determined by the justices, is not "a person aggrieved" within s. 33. This point was taken, but was not decided, in *Stokes* v. *Checkland*. (1) [He referred to *Reg.* v. *Justices of London*. (2)]

H. Sutton, for the appellant. The latter part of s. 33 of the Summary Jurisdiction Act, 1879, shews that it must be read with s. 2 of the Summary Jurisdiction Act, 1857, which gives a right of appeal by case stated to "either party to the proceeding" before the justices. Those words are not cut down by the expression "any person aggrieved" in the later Act. The appellant is a party to the proceeding. Although this case purports to have been stated under the Act of 1879 only, it is in fact stated under both Acts, for s. 33 expressly provides that the Act of 1857 shall apply to a case stated under that section as if it were stated under the earlier Act, which contains a number of conditions precedent to the right of appeal which have to be observed. *Reg.* v. *Justices of London* (2) was a decision as to the right of appeal to quarter sessions under s. 105 of the Highway Act, 1835, the language of which is different from that of these Acts, and the section does not contain the words "either party to the proceeding."

(1) (1893) 68 L. T. 457. (2) (1890) 25 Q. B. D. 357.

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The Court intimated that they would hear the case before giving a decision on the preliminary objection.

H. Sutton, for the appellant. The justices should have convicted the respondent. A primâ facie case was made against him, and he called no evidence to rebut it. The intention of the Act as shewn by s. 50 is that whenever there is a contravention of the rules by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against the Act, although he may not have been a party to the infringement of the rule, unless he proves that he had taken all reasonable means by publishing and enforcing the rules to prevent such contravention. There is no evidence here that the respondent did anything at all to prevent a contravention of the rules. The justices seem to have thought that the onus lay on the prosecution to prove that the respondent had been negligent, and they relied on the fact that he had appointed a duly qualified manager and under-manager. That fact alone does not bring him within the protection afforded by s. 50, because the appointment of manager is a separate matter dealt with by s. 20, under which the agent of a mine is liable to a fine if a manager is not appointed. *Wynne* v. *Forrester* (1) shews that an agent may be convicted for a breach of the regulations although the mine is under the control of a duly certified manager.

[LORD ALVERSTONE C.J. referred to *Baker* v. *Carter*. (2)]

In *Baker* v. *Carter* (2) the defendant was the owner of the mine, living at some distance from it and taking no part in the management. But in the present case the respondent could not have failed to discover the want of ventilation unless there was some laxity on his part, and, as he has given no explanation why he did not discover it either by visiting the mine or in some other way, he cannot rely upon the protection afforded by s. 50.

Brough, for the respondent was not called upon to argue.

LORD ALVERSTONE C.J. As to the preliminary objection, the Summary Jurisdiction Act, 1857, s. 2, gave power to justices

(1) (1879) 5 C. P. D. 361. (2) (1878) 3 Ex. D. 132.

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to state a case, and expressly provided that either party to the proceeding before the justices might, if dissatisfied with the determination as being erroneous in point of law, apply to the justices to state a case. It is not disputed that under that Act a person who has preferred an information is a party to the proceeding and can apply for a case. Then came s. 33 of the Summary Jurisdiction Act, 1879, which purports to amend the procedure, and which gives power to a person aggrieved to apply to the Court of summary jurisdiction to state a special case, and, if the Court decline to do so, to the High Court of Justice for an order requiring the case to be stated. Sub-s. 2 of s. 33 is as follows: "The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in manner prescribed by Rules of Court and in pursuance of the Supreme Court of Judicature Act, 1875, and the Acts amending the same; and, subject as aforesaid, the Act of 20 & 21 Vict. c. 43 shall so far as is applicable, apply to any special case stated under this section as if it were stated under that Act. Provided that nothing in this section shall prejudice the statement of any special case under that Act."

I do not think that it was intended by s. 33 to cut down the right of a party to the proceedings to apply for a case. It is contended that, because at the heading of this case there is no statement that the case was stated under both Acts, therefore it must be taken to have been stated under the Act of 1879 only; and it is further contended that a "person aggrieved" would not include an unsuccessful prosecutor. Counsel referred to the case of *Reg.* v. *Justices of London* (1), but that case did not arise under either of these Acts; it arose under the Highway Act, which gives a right of appeal to quarter sessions. I think that a question may arise as to who has a right to apply for a case to be stated under s. 33 of the Act of 1879; but I am clearly of opinion that a person who was a party to the proceedings before the justices is within the earlier Act, and I do not think this case could have been stated

(1) 25 Q. B. D. 357.

except under both Acts. It cannot be assumed that, because the heading of the case only refers to the Act of 1879, the case was not stated under both Acts. In my opinion the preliminary objection fails, and we are entitled to entertain the appeal.

Now, as to the merits of the case, the justices have found "that the respondent had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager who knew the rules, and whose duty it was to carry out the rules without further interference from him. The violation of the rules, therefore, was in no way caused by the respondent omitting to enforce the rules"; and they have further found that "the non-ventilation of the heading No. 29 was caused by the temporary diversion of the air-pipes at the entrance thereto into an adjacent heading which was then being driven"; and lastly they have found that "only an occasional irregularity was proved, and not one which had been continuous." In these circumstances it is contended for the appellant that under s. 50 of the Coal Mines Regulation Act, 1887, the respondent, who is the agent of the mine, has not discharged the onus which is thrown upon him. I think it is very material to observe that the manager and under-manager were prosecuted as well as the agent, and the two former were convicted, the agent being acquitted. It cannot be contended that the agent must in all cases of necessity be called as a witness in his own defence. That is practically negatived by *Baker* v. *Carter* (1), which was recognised as good law in *Stokes* v. *Checkland*. (2) Further, it cannot be said in this case that the rules had not been published: it is obvious from the statement in the case that they had been published; at any rate, no point was made against the respondent in that particular respect. Therefore, counsel for the appellant was driven to argue that, when dealing with the question of onus of proof under s. 50, a different rule must be applied in the case of an agent to that which is applicable in the case of an owner. There are, I think, agents and agents. There may be an agent who is doing part of the duties of a manager, and

(1) 3 Ex. D. 132. (2) 68 L. T. 457.

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there may be an agent who is taking such part in the supervision that he will only have the duties cast upon him which are ordinarily cast upon owners; but to say that justices must convict an agent because he has done no more than appoint a fully competent and qualified manager and under-manager, and must convict him in respect of an offence which is found in fact to be due to the negligence on a single occasion of the manager, seems to me to be going a great deal further than we ought to go, and further than a proper construction of the section warrants us in doing. I have already pointed out that in *Baker* v. *Carter* (1) it was decided in favour of the owner that the fact that he had appointed a competent manager was sufficient to exonerate him, and I do not think that that is in any way affected by anything that was said in *Wynne* v. *Forrester* (2); and the judgment in *Stokes* v. *Checkland* (3), in which case *Wynne* v. *Forrester* (2) and *Baker* v. *Carter* (1) were both referred to, strongly supports the view that the justices might find as they have done in this case.

I will only add that I think this case brings out in strong relief the distinction between a case stated after an acquittal and a case stated after a conviction. Where there has been an acquittal, it is incumbent upon the appellant to shew, upon the facts stated, that there must have been a conviction. In the present case all we have to say is, either that the justices could not in law have come to the conclusion which they did upon the evidence before them, or that upon the evidence, it not being necessary to call the agent as a witness, the justices were entitled to find as a fact that the agent had taken all reasonable means to prevent a contravention of the rules. I think that the latter is the right view, and that we should be wrong if we threw any doubt upon their decision; and I, therefore, think that the appeal should be dismissed upon the merits.

DARLING J. I am entirely of the same opinion. With regard to the preliminary point which has been taken, I think that an appeal does lie in this case.

(1) 3 Ex. D. 132. (2) 5 C. P. D. 361. (3) 68 L. T. 457.

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Darling J.

With regard to the other point, the justices have found that the respondent, the agent of the mine, took proper steps to enforce the rules. He had appointed a manager and an under-manager; and the rules were broken in this respect, that in making a new heading the under-manager had by his negligence allowed a temporary diversion of a ventilating pipe, the ventilation of the headings being found by the justices to be otherwise adequate. Now, it seems to be impossible that any one, with any acquaintance with colliery management, such as, I have no doubt, these justices had, could have reasonably come to any other conclusion than that to which they came. They knew perfectly well what the agent of a colliery does. He may be agent for a very large extent of property. He appoints a manager and an under-manager. Why? To see after the very things to which it is not reasonable to suppose that he can be giving his own constant personal attention. He cannot always be present at the mine. How is it possible that a man in the position of a colliery agent can see that ventilation is not temporarily interfered with? It seems to me that not only was there evidence here upon which the magistrates could have come to the conclusion to which they came, but that they could not have come to any other. I think this appeal should be dismissed.

CHANNELL J. I am of the same opinion upon both points. I am inclined to think that there has been some case which decided the point taken here as a preliminary objection; but at any rate I think we ought to decide the point now; and, although we are doing here the same as was done in *Stokes* v. *Checkland* (1), namely, dismissing the case upon its merits, so that it may be said our decision upon this preliminary point is not necessary, I think we must be taken to have decided it. My opinion is that the powers as to stating a case, contained in the Acts of 1857 and 1879, are not separate powers, although there is a slightly different machinery, but that, in substance, the two Acts are to be read together. There is, as my Lord has pointed out, a slight doubt whether a person who comes

(1) 68 L. T. 457.

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Channell J.

to this Court to get a rule to order a magistrate to state a case must not be a person who is aggrieved, and whether that provision in s. 33 of the Act of 1879 applies to a prosecutor. That question may arise at some future time. I do not think that it has been noticed hitherto, and I think there are many cases to be found in which orders have been made upon magistrates to state cases in such circumstances.

As to the point upon the merits, I think it is quite clear that the justices did not make any mistake. I think they were aware, when they gave their decision, that the onus was upon the defendant; but they held, and I think rightly, that, although the onus was upon him, it might be, and had in fact been, made out upon the evidence which had been given for the prosecution. The substantial point is that the justices found that the negligence in question was a mere casual piece of negligence, which nobody could have anticipated, and it was, therefore, unnecessary for the respondent to go into the witness box and swear that he did not know of it.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Treasury.*

Solicitors for respondent: *Sharpe, Parkers & Co., for Vincent H. Jackson, Hanley.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1902
April 14.

HOLLAND *v.* BENNETT.

Practice—Writ for Service out of the Jurisdiction—Breach of Contract, whether within or out of the Jurisdiction—Wrongful Dismissal—Letter written Abroad—Order XI., *r.* 1 (*e*).

The plaintiff was employed by the defendant, a foreigner resident abroad, as the London correspondent of a newspaper, of which the defendant was the proprietor. The defendant gave notice of dismissal to the plaintiff by a letter written and posted abroad to the plaintiff in this country. In an action for wrongful dismissal by the plaintiff against the defendant, leave had been given to issue a writ of which notice was to be served on the defendant out of the jurisdiction, and notice of the writ had been accordingly served upon him abroad:—

Held, that, the alleged breach of contract having taken place out of the jurisdiction, the case did not fall within Order XI., r. 1 (*e*), and therefore the writ and service must be set aside.

APPEAL from an order of Bucknill J. at chambers setting aside the writ and service.

The action was for wrongful dismissal.

The defendant, who was the proprietor of the *New York Herald*, was not a British subject, and resided in France. He had employed the plaintiff in this country as the London correspondent for the European edition of the *New York Herald*.

The plaintiff's engagement had been terminated by a letter written and posted by the defendant at Naples to the plaintiff in England, giving the plaintiff two weeks' notice of dismissal. The plaintiff obtained leave from a judge at chambers for the issue of a concurrent writ and service of notice thereof on the defendant in France, and notice of the writ had accordingly been served upon the defendant at Nice. The defendant, having entered a conditional appearance, applied at chambers for an order setting aside the writ and service, on the ground that the case did not come within the terms of Order XI., r. 1 (*e*).

The master made the order applied for on the authority of

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Cherry v. *Thompson* (1), and the judge on appeal affirmed his order.

E. Tindal Atkinson, *K.C.*, and *P. Rose Innes*, for the plaintiff. *Cherry* v. *Thompson* (1) was decided on s. 18 of the Common Law Procedure Act, 1852, and the question is whether that case governs the present, which arises under Order XI., r. 1 (*e*). The first point decided in that case was that under the Common Law Procedure Act, 1852, s. 18, it was necessary that the whole cause of action, and not merely the breach of contract, should have arisen within the jurisdiction. That being so, it was not really necessary in that case to decide that the breach arose out of the jurisdiction. Moreover, it appeared that the marriage was intended to take place in Germany, and at any rate the contract was not necessarily to be performed in England. The only possible breach that could be relied on in that case was the repudiation of the contract which was by the letter written in Germany. In this case the plaintiff was already in the employment of the defendant in England, and the breach was really the failure to continue to employ him in England as promised, which must be taken to have occurred in this country. It is as if the defendant had instructed an agent of his to proceed to England, and there give notice of dismissal to the plaintiff. The Post Office authorities were his agents to hand the notice of dismissal to the plaintiff. It is submitted that the plaintiff cannot be considered as dismissed until he received the letter giving him notice of dismissal.

Norman Craig (*J. E. Bankes*, *K.C.*, with him), for the defendant. The case of *Cherry* v. *Thompson* (1) expressly decided the point that the breach in such a case as the present must be taken to have arisen out of the jurisdiction, as well as the other point raised. There are two Irish cases which were decided on the authority of *Cherry* v. *Thompson* (1) and which were cases of wrongful dismissal, namely, *Matthews* v. *Alexander* (2) and *Hamilton* v. *Barr*. (3) In actions for wrongful dismissal the cause of action is not the refusal to pay salary

(1) (1872) L. R. 7 Q. B. 573. (2) (1873) I. R. 7 C. L. 573.
(3) (1886) 18 L. R. (Ir.) 297.

earned, but the refusal to allow the plaintiff to earn salary, and that refusal was in this case by the letter written abroad.

P. Rose Innes, in reply.

VAUGHAN WILLIAMS L.J. I think that the order of the learned judge was right. It seems to me impossible for us to hold otherwise without saying that the decisions in *Cherry* v. *Thompson* (1) and the two Irish cases, to which our attention has been called, were wrong. It is a matter of great importance that the decisions on this subject should be uniform and certain; and, in my opinion, no sufficient reason has been suggested in this case to lead us to say that those decisions were wrong. The effect of them is that there was a complete breach of the contract when the letter giving notice of dismissal was posted abroad, and under these circumstances I think that the order was right and the appeal must be dismissed.

MATHEW L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Spencer Cridland & Co.*
Solicitors for defendant: *Lewis & Lewis.*

(1) L. R. 7 Q. B. 573.

E. L.

C. A.
1902
April 9.

[IN THE COURT OF APPEAL.]

ELLIOTT *v.* GARRETT.

Practice—Discovery—Interrogatories—Defamation—Privilege—Inquiry as to Information inducing Belief of Defendant in Truth of Words spoken—Inquiry as to Steps taken by Defendant to ascertain Truth.

In an action for slander in imputing to the plaintiff that, being a member of a metropolitan borough council, he had accepted a bribe in connection with a matter that came before the council for decision, the defendant, who was also a member of the council, pleaded that the words were spoken, if at all, in good faith, without malice towards the plaintiff, and in the discharge of his duty as councillor, and on an occasion which was privileged. The plaintiff applied for leave to administer to the defendant an interrogatory asking what information the defendant had which induced him to believe that the words spoken by him were true, and what steps he had taken before speaking the words to ascertain whether they were true. On appeal from an order disallowing the interrogatory:—

Held, that the interrogatory should be allowed as being relevant to the issue of malice raised by the pleadings and directed to support the plaintiff's case.

APPEAL from an order of a judge at chambers, refusing to allow an interrogatory which the plaintiff proposed to administer to the defendant in an action of slander.

The statement of claim averred that the plaintiff and defendant were members of the borough council of Islington, and that the vestry of Islington, now the borough council (of which the defendant was also a member), resolved to contribute a certain sum towards the purchase of the Alexandra Palace and Park, subject to an Act of Parliament being obtained to carry out that object, which was subsequently done. That in November, 1901, the plaintiff was a candidate for the office of mayor of the borough, and the defendant, on being asked by one Harvey, a member of the council, to vote for the plaintiff, falsely and maliciously spoke and published of him these words: "What! vote for Elliott, after what I have been told!" and also, "What! Haven't you heard? Why, it is going all round!

Elliott has received a bribe of a 50*l.* note in connection with the Alexandra Park affair." And on the same day, in the presence of two councillors, Harvey and Bryett, the defendant further falsely and maliciously spoke and published of the plaintiff these words: "I have just been telling Harvey that it is not my intention to vote for Elliott; decidedly not; I do not think that a man like him would do any good as mayor, owing to his having received a certain bank-note from the Alexandra Palace to get their matter pushed through." The allegation was that the slanders meant that the plaintiff had committed an offence under the Public Bodies Corrupt Practices Act, 1889, and had rendered himself liable to the pains and penalties prescribed by that Act; and further, that he had been guilty of gross misconduct in his office of vestryman, and was not a fit and proper person to be mayor of the borough, or to hold any office as a member of any public body.

The defendant averred that if he spoke and published the words he did so only to the persons named, and in answer to inquiries by them, and that they had a common interest with him in the matters referred to, and that the words were spoken, if at all, bonâ fide and without malice towards the plaintiff, and in the honest discharge of the defendant's duty as a councillor, and with the honest desire to protect, as was his duty, the interests of the councillors and ratepayers of the borough, and that the occasion was privileged.

The plaintiff applied for leave to administer certain interrogatories, one of which was, "What information, if any, had you that induced you to believe that the words were true, or what steps, if any, had you taken before speaking the words to ascertain whether they were true or not?"

The application came before Bucknill J. at chambers, who refused to allow the interrogatory, but gave leave to appeal.

The plaintiff appealed.

Witt, *K.C.*, and *A. P. Poley*, for the plaintiff. The interrogatory which has been objected to is relevant to an issue raised by the defendant, it relates to a matter within the knowledge of the defendant, and it is material to enable the plaintiff

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to maintain his own case and destroy that of the defendant. It therefore comes within the tests applicable to the admissibility of interrogatories, and should be allowed. The case of *Martin* v. *British Museum Trustees* (1) is in point.

Hugh Fraser, for the defendant. In *Hennessy* v. *Wright* (2) the defendant pleaded privilege, and interrogatories resembling those in the present case, and directed to the defendant's source of information, were disallowed. Lord Esher said that interrogatories "to enable the party to see if he can find a case, either of complaint or defence, of which at present he knows nothing," were inadmissible, and that applies to the present case. So, in *Parnell* v. *Walter* (3), questions as to by whom information was supplied and what steps had been taken to verify the information supplied to the defendants were disallowed. Denman J. pointed out that it was settled law that it was not competent to the plaintiff in an action for libel to administer interrogatories asking the defendant from whom he got his information. *Martin* v. *British Museum Trustees* (1) is distinguishable. The defence pleaded in that case was a statutory one, and no principle was laid down which conflicts with the settled practice at chambers, upon which the learned judge acted.

VAUGHAN WILLIAMS L.J. I think this is a perfectly clear case, and that in deciding that this interrogatory should be allowed we are not doing anything in conflict with any previous case. The objection made to the allowing of this interrogatory cannot be based on the suggestion that it is not relevant to the matters in question in the action, for it is obviously relevant to a distinct issue raised by the pleadings. The defendant has pleaded privilege, and necessarily alleged that the statement, if made by him, was made in good faith and without malice and in the honest discharge of his duty, and this interrogatory is aimed at enabling the plaintiff to prove that which if proved would be an answer to the plea of privilege, namely, that the statement was malicious. If that is so, the interrogatory is

(1) (1893) 10 Times L. R. 215. (2) (1890) 24 Q. B. D. 445, n.
(3) (1890) 24 Q. B. D. 441.

directed to support the plaintiff's case. It is then said that the interrogatory should not be allowed because it is a fishing one; but I do not think it is anything of the sort. The plaintiff's case is set out in the statement of claim, and the only thing that he is seeking is to get, in support of his case, evidence which lies only within the knowledge of the defendant. I do not propose to go at length into the cases that have been cited, but one of them, *Martin* v. *British Museum Trustees* (1), covers this case, and the other cases to which attention has been called as contradicting the case I have mentioned do not seem to me to be in conflict with it. So far as *Parnell* v. *Walter* (2) is concerned, the interrogatories were directed to matter which related to damages and nothing else. As to *Hennessy* v. *Wright* (3), Lord Esher at the beginning of his judgment in terms affirms the doctrine which is the basis of the judgment in *Martin* v. *British Museum Trustees* (1), and then goes on to point out why the particular interrogatories should not be allowed, because they were only directed to ascertain if there was malice in the person who communicated the information to the defendant. As to the practice which is alleged to exist at chambers, I cannot speak of what it may be at the present time, but I very much doubt whether any such practice as is suggested was formerly in existence. I think, therefore, the appeal must be allowed.

ROMER L.J. I agree.

MATHEW L.J. I am of the same opinion. It seems to me that it is idle to talk of a principle which is applicable to all cases of this sort—each must depend on its own facts. It is said that there is a practice at chambers to disallow such interrogatories. The cases that have been referred to seem to me to shew that there is no such practice.

What then ought to be done in this particular case? The action is for publishing a libel, and the defence is that the words were uttered on a privileged occasion and were not

(1) 10 Times L. R. 215. (2) 24 Q. B. D. 441.
(3) 24 Q. B. D. 445, n.

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spoken maliciously because the defendant had heard something which justified him in making the statements. The interrogatory in effect asks what that information was. I cannot see any objection to the inquiry.

Appeal allowed.

Solicitors for plaintiff: *Samuel Price & Sons.*
Solicitors for defendant: *Tatham, Oblein & Nash.*

A. M.

1902
April 21;
May 3.

THE GREAT NORTHERN AND CITY RAILWAY COMPANY *v.* TILLETT.

Lands Clauses Acts—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 121—*Tenant from Year to Year—Determination of Amount of Compensation by Justices—Jurisdiction to inquire into Title—"Required to give up Possession"—Condition Precedent to Right to Compensation.*

Where an application is made to justices under s. 121 of the Lands Clauses Consolidation Act, 1845, to determine the amount of compensation to be paid to a person claiming an interest as a tenant for a year, or from year to year, in land compulsorily taken, the justices have no jurisdiction to inquire into the title of the claimant to his alleged interest; but in determining the amount of compensation the justices have jurisdiction, and are bound, to inquire whether the claimant has been required to give up possession of the land before the expiration of his term or interest, that being a condition precedent to the right to compensation under s. 121.

CASE stated by an alderman and justice of the City of London.

On October 10, 1901, the respondent made application to the Court of summary jurisdiction sitting at the Guildhall, that the Court should determine the amount of compensation to be paid to him under the Lands Clauses Consolidation Act, 1845, by the appellants in respect of 32, Finsbury Pavement.

On the hearing of the summons the following facts were either proved or admitted. In 1899 the respondent, with Frank Yeoman and Clement Andrews, carried on the business of auctioneers and surveyors under the name of Tillett & Yeoman in part of the basement of 32, Finsbury Pavement, which they held from their immediate landlord, Matthew Jervoise Jarvis, who acted as solicitor for them and the

respondent in the reference to the claims and proceedings hereinafter mentioned. When the tenancy was created it was agreed that it should expire on December 25, 1899, but Tillett & Yeoman remained in possession after that date. Negotiations were entered into between Tillett & Yeoman and Jarvis with a view to extend the tenancy, the result of which was at issue between the respondent and the appellants.

On June 12, 1899, notice to treat was served on behalf of the appellants upon Jarvis, and on June 14, 1899, a like notice was served on Tillett & Yeoman. On July 3, 1899, the latter sent in a claim for compensation on the basis of an interest which they were unable to support, and which was ultimately abandoned.

In March, 1900, Tillett & Yeoman, for their own purposes, went out of actual occupation of the premises, but retained the key.

On January 1, 1901, Jarvis assigned to the appellants his lease of 32, Finsbury Pavement.

In February, 1901, the appellants commenced to pull down the premises.

On August 29, 1901, the respondent, who had been appointed the receiver and manager of the business of Tillett & Yeoman, sent in a claim for 560*l.* on the basis of a tenancy from year to year of the part of the basement of 32, Finsbury Pavement.

It was objected on behalf of the appellants at the hearing that the alderman had no jurisdiction to determine the amount of the compensation, and that the summons ought to be dismissed on the grounds (*a*) that the premises were not in the possession of the respondent or of Tillett & Yeoman within the meaning of s. 121 of the Lands Clauses Consolidation Act, 1845 (1), and (*b*) that the respondent or Tillett & Yeoman were

(1) The Lands Clauses Consolidation Act, 1845, s. 121: "If any such lands shall be in the possession of any person having no greater interest therein than as a tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands . . . . and the amount of such compensation shall be determined by two justices in case the parties differ about the same."

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GREAT NORTHERN AND CITY RAILWAY v. TILLETT.

not on the facts within s. 121, or entitled to issue the summons or to claim to have compensation assessed.

The alderman decided to assess the compensation, as required by the summons, on the ground that the respondent and Tillett & Yeoman could only obtain compensation and get it assessed under s. 121, and on the authority of *Reg.* v. *Kennedy* (1) and *Bexley Heath Ry. Co.* v. *North* (2); and he assessed the compensation at 560*l.*

The question for the opinion of the Court was, whether the respondent and Tillett & Yeoman were entitled to have the compensation determined under s. 121 of the Act. If the Court should be of opinion in the affirmative, the award was to stand; otherwise the award was to be set aside and the summons dismissed.

Hansell, for the appellants. The respondent is not entitled to compensation. He was not, at the time the appellants entered on the premises, a yearly tenant or a tenant from year to year. The tenancy which was existing at the date of the notice to treat expired at Christmas, 1899, and, whatever may have been the nature of the respondent's occupation of the premises after that date, it was not a tenancy in respect of which he can claim compensation, as it was created after the notice to treat: *Ex parte Edwards.* (3) Secondly, the respondent was not required to give up possession before the expiration of his term. He went out of possession voluntarily in March, 1900. On both grounds, therefore, the respondent failed to bring himself within s. 121, and the alderman had no jurisdiction to entertain the claim. [He referred to *Reg.* v. *Stone.* (4)]

Park Goff, for the respondent. Where a claim for compensation is made under s. 121, the justices have no jurisdiction to inquire into any question as to the claimant's title, but only to assess the amount of compensation. The question whether the respondent had any interest entitling him to compensation is one which will have to be determined in an action on the award, in which action the appellants will be able to raise the

(1) [1893] 1 Q. B. 533.
(2) [1894] 2 Q. B. 579.
(3) (1871) L. R. 12 Eq. 389.
(4) (1866) L. R. 1 Q. B. 529.

question of liability by way of defence: *In re East London Ry. Co.* (1); *Reg.* v. *London and North Western Ry. Co.* (2); *Brierley Hill Local Board* v. *Pearsall.* (3) Although the respondent ceased to occupy the premises after March, 1900, he never gave up possession until the appellants entered, as is shewn by the fact that the respondent retained the key of the premises. [He also referred to *Reg.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (4)]

Hansell, in reply. None of the cases cited was decided under s. 121. It is not a question of the claimant's title to the lands taken, but a question whether the claimant has such an interest in the land as alone gives justices jurisdiction to award compensation under s. 121.

Cur. adv. vult.

May 3. The judgment of the Court (Lord Alverstone C.J., Darling and Channell JJ.) was read by

LORD ALVERSTONE C.J. This was a case stated by an alderman of the City of London on an application made to him to assess compensation under s. 121 of the Lands Clauses Act. That section requires that the amount of compensation payable to persons who have no greater interest than as tenant for a year or from year to year shall be determined by justices. The facts raise two questions: first, whether in such a case the justices have power to inquire and determine whether the claimant has the interest which he alleges; and, secondly, whether the claimants were required to give up possession before the expiration of their term within the meaning of the section.

As regards the first point, namely, whether the justices have any jurisdiction to inquire into the title of the claimant to the interest which he alleges, we are clearly of opinion that they have no such right. The duty of the justices is in this respect practically the same as that which is under other sections of the Act to be discharged by juries and arbitrators. As was pointed out in the case of *Reg.* v. *Lord Mayor of London* (5),

(1) (1890) 24 Q. B. D. 507.
(2) [1894] 2 Q. B. 512.
(3) (1884) 9 App. Cas. 595.
(4) (1854) 4 E. & B. 88.
(5) (1867) L. R. 2 Q. B. 292.

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GREAT NORTHERN AND CITY RAILWAY v. TILLETT.

Lord Alverstone C.J.

s. 121 of the Act comes by way of proviso taking out of the previous general enactment a particular branch for which it makes a particular provision, and, therefore, on principle the same rules as to investigation of title should apply, although the tribunal for assessing the amount of compensation is different. A long series of authorities, commencing with *Reg.* v. *London and North Western Ry. Co.* (1), and followed by many subsequent cases, has conclusively established that the jury or arbitrator has no right to try a question of the claimant's title to the interest which he alleges; any such question must be raised in subsequent proceedings. Although there is no authority expressly dealing with the case under s. 121, the same principle is, in our opinion, practically recognised in the cases of *Reg.* v. *Hannay* (2) and *Cranwell* v. *Mayor, &c., of London.* (3) Therefore, upon the first point raised, we are of opinion that, the claimants alleging that they had an interest as tenants from year to year, the justices were bound to assess compensation upon that basis, assuming no other objection could be taken to their jurisdiction.

It is, however, a condition precedent to the right to claim compensation under s. 121 that the claimant shall have been required to give up possession before the expiration of his term or interest therein, and that in that case he shall be entitled to compensation for the value of his unexpired term or interest. It is, we think, obvious from this language that the justices must ascertain whether or not the claimant has been required to give up possession before the expiration of his term, because the quantum of compensation will depend upon that fact. If the claimant was required to give up possession only a few days before the expiration of his term, the compensation would be very different from that which he would receive if he was required to give it up more than six months, or it might be nearly eighteen months, before his interest could be determined; and the cases of *Reg.* v. *London and Southampton Ry. Co.* (4) and *Reg.* v. *Stone* (5) are, in our opinion, autho-

(1) (1854) 3 E. & B. 443.
(2) (1874) 44 L. J. (M.C.) 27.
(3) (1870) L. R. 5 Ex. 284.
(4) (1839) 10 A. & E. 3.
(5) L. R. 1 Q. B. 529.

rities to shew that requirement to give up possession is an essential condition of the right to claim an assessment of compensation under s. 121. Applying this rule to the facts of this case, it appears that notice to treat having been given to the claimants on June 14, 1899, the term on which they were then holding expired on December 25, 1899; that they then held over upon conditions which are not agreed, but which, as the claimants claimed to be tenants from year to year, would, as we have already said, compel the justices to assess compensation on that basis; in the month of March, 1900, the claimants went out of occupation, merely retaining the key. Nothing further happened as far as they were concerned until February 22, 1901, when the company, having taken an assignment of the landlord's interest, pulled the house down. Under these circumstances we are of opinion that there was no evidence that the claimants were required by the company to give up possession of lands occupied by them before the expiration of their term or interest, and upon this ground the alderman ought to have held that he could not assess any compensation.

If the claimants have any claim against the company based upon the fact that when they went out of possession they retained the key, this would in our opinion not be matter for compensation under s. 121; but if any claim could be founded thereon, as to which we express no opinion, it would have to be dealt with by action, as pointed out in the case of *Cranwell* v. *Mayor, &c., of London* (1), to which we have already referred.

For the above reasons we are of opinion that our judgment must be for the appellants.

Appeal allowed.

Solicitors for appellants: *Le Brasseur & Oakley.*

Solicitor for respondent: *M. J. Jarvis.*

(1) L. R. 5 Ex. 284.

F. O. R.

1902
April 9.

KNIVETON *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY.

Practice—Appeal—County Court—Order under s. 5 of Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37)*—Appeal to High Court—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 120.

An appeal lies to the King's Bench Division against an order made by a county court judge under s. 5 of the Workmen's Compensation Act, 1897.

APPEAL from the Bolton County Court.

On December 13, 1900, the plaintiff was injured by an accident arising out of and in the course of his employment by the Darcy Lever Coal Company, and took proceedings for compensation under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37).

On May 8, 1901, an award was made in favour of the plaintiff for the payment of a weekly sum of 14*s.* 9*d.* during incapacity. The Darcy Lever Coal Company was being wound up, and no payments were made to the plaintiff under the award. The plaintiff then applied for an order that the Northern Employers' Mutual Indemnity Company should pay him the weekly sum due under the award, under s. 5 (1) of the Workmen's Compensation Act, 1897, alleging that the Darcy Lever Coal Company were entitled to the amount of the weekly payments from the insurance company.

(1) The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 5 (1): "Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt . . . . or, if the employer is a company, of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly."

On December 4, 1901, the county court judge made an order that the insurance company should pay to the plaintiff the arrears of the weekly payments, and should continue the payments under the award. The insurance company appealed to the King's Bench Division upon the ground that the Darcy Lever Coal Company were not entitled to any sum from them in respect of the weekly payments due to the plaintiff.

Chester Jones, for the respondent. There is a preliminary objection, on the ground that no appeal lies to this Court. The Act of 1897 contains in itself a complete code of procedure, and the only right of appeal given by that Act is an appeal to the Court of Appeal under Sched. II. (4); the general right of appeal on questions of law given by s. 120 of the County Courts Act, 1888, has no application. It is true that Sched. II. (4) gives no right of appeal to the Court of Appeal in proceedings against insurers under s. 5, sub-s. 1, of the Act; the decision of the county court judge is, therefore, final.

Haldane, *K.C.*, and *F. E. Smith*, for the appellants. The application against insurers under s. 5, sub-s. 1, is not a part of the arbitration proceedings for the assessment of compensation; it is a subsequent and entirely separate proceeding, to which the right of appeal given in arbitration proceedings can have no application. The language of s. 120 of the County Courts Act, 1888, is general, and, applying as it does to any person in any action "or matter," is wide enough to give a right of appeal to this Court in the present case.

LORD ALVERSTONE C.J. As to the preliminary objection, the case in the Court of Appeal, *Leech* v. *Life and Health Assurance Association* (1), shews that there is no appeal to the Court of Appeal in matters arising under s. 5 of the Workmen's Compensation Act. Under s. 5 there is a statutory subrogation of the workman to the rights of the employer, and it seems to me that, the matter being within the purview of the county

(1) [1901] 1 K. B. 707.

1902

KNIVETON v. NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY.

court judge, there is the ordinary right of appeal, under s. 120 of the County Courts Act, 1888, to this Court.

DARLING and CHANNELL JJ. concurred.

Objection overruled. Appeal allowed.

Solicitors for appellants: *Rowcliffes, for Peace & Ellis, Wigan.*

Solicitors for respondent: *Chester & Co., for Fielding & Fernihough, Bolton.*

J. F. C.

1902

April 26.

[CROWN CASE RESERVED.]

THE KING *v.* HADWEN AND INGHAM.

Criminal Law — Evidence — Prisoners jointly indicted — Evidence by one Prisoner incriminating another—Right of the latter to cross-examine— Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*), (*iii.*)

Where one of two prisoners, jointly indicted, gives evidence under s. 1 of the Criminal Evidence Act, 1898, and in doing so incriminates the other prisoner, the latter is entitled to cross-examine the former.

CASE stated by Ridley J.

The two prisoners were jointly indicted at the assizes held for the West Riding of the county of York at Leeds, and tried on March 14 and 15, 1902, upon an indictment whereby they were jointly charged in thirty counts with the following: (*a*) Offences under the Debtors Act, 1869, s. 11, sub-s. 10, in making and being privy to the making of certain false entries in a document relating to their affairs, namely, a certain balance-sheet, within four months before the presentation of a bankruptcy petition by them, with intent to conceal the state of their affairs; (*b*) offences under s. 13 of the same Act by obtaining credit under false pretences in incurring a debt to the Halifax and Huddersfield Union Banking Company; (*c*) conspiring together to cheat and defraud the said banking company.

The prisoners had for many years before their said trial

carried on business in co-partnership as silk spinners, under the style of Hadwen & Sons, at Triangle, near Halifax, and the banking account of the firm was kept with the said Halifax and Huddersfield Union Banking Company.

Each prisoner pleaded "Not guilty" to the whole of the indictments, and was separately defended by counsel.

Upon the close of the case for the Crown, each prisoner elected to give evidence upon oath; and each prisoner then gave evidence exculpating himself, and also gave evidence against the other prisoner who was charged with the same offences.

Counsel on behalf of each prisoner then claimed the right to cross-examine the other prisoner upon the evidence given by him against his co-prisoner.

The objection was taken that such cross-examination was not permissible, and the learned judge upheld that contention, and excluded all cross-examination of one prisoner on behalf of the other prisoner, but agreed to state a case for the opinion of this Court.

The jury found both prisoners guilty upon all the counts.

The prisoners were released on bail, and this case was stated for the consideration of the Court.

The question for the opinion of the Court was whether under the above circumstances counsel for one prisoner was (as he claimed), or was not, entitled to cross-examine the other prisoner upon the evidence given by the latter upon oath against him.

If the learned judge was right in excluding such cross-examination the conviction was to be affirmed; otherwise it was to be quashed.

Tindal Atkinson, K.C. (*Waugh* with him), for the prisoner Hadwen; *Scott Fox*, K.C. (*R. A. Shepherd* with him), for the prisoner Ingham. The ruling of the learned judge was wrong. Before the passing of the Criminal Evidence Act, 1898, a statement not on oath by one prisoner was not evidence against another prisoner, because it could not be cross-examined to; but if witnesses called by one prisoner gave evidence tending to incriminate another prisoner, they could be cross-examined

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by that other: *Reg.* v. *Woods* (1); *Reg.* v. *Burditt* (2); and in civil cases one co-defendant can cross-examine another co-defendant: *Allen* v. *Allen* (3); *Lord* v. *Colvin.* (4) By the Criminal Evidence Act, 1898, a prisoner who elects to give evidence is, subject to the qualifications contained in the Act, in the same position as any other witness for the defence, and, therefore, he primâ facie is liable to be cross-examined by a fellow-prisoner in circumstances similar to those in which other witnesses called for the defence of one prisoner can be so cross-examined. The Act clearly contemplates that he may be cross-examined, because it provides by s. 1 (*f*) that he shall not be cross-examined as to bad character except in certain events, one of which is, if he has given evidence against any other person charged with the same offence. The most obvious case to which those words apply is a case like the present, where one prisoner endeavours to exculpate himself by throwing the blame upon another prisoner. To hold that in circumstances like these one prisoner is not entitled to cross-examine another would work great hardship, and would be calculated to defeat the ends of justice. [*Reg.* v. *Martin* (5) was also cited.]

Harold Thomas (*Milvain, K.C.*, with him), for the prosecution. The contention that one prisoner may be cross-examined by another involves the assumption that he is a witness for the prosecution. That contention is contrary to the policy of the Act, which expressly provides that a prisoner shall be a competent witness for the defence. In *Reg.* v. *Woods* (1) and *Reg.* v. *Burditt* (2) the Court treated the witnesses called by the one prisoner as, in effect, giving evidence for the prosecution, and it was on that ground that cross-examination by the other prisoner was permitted; but the evidence of a prisoner cannot be so regarded, as it is only as a witness for the defence that a prisoner is under the Act competent to give evidence. A prisoner can, therefore, only be cross-examined by counsel for the prosecution. In the case of prisoners jointly indicted the proper course is for one prisoner to examine the

(1) (1853) 6 Cox C. C. 224.
(2) (1855) 6 Cox C. C. 458.
(3) [1894] P. 248.
(4) (1855) 3 Drew. 222.
(5) (1889) 17 Cox C. C. 36.

other, and, if he becomes hostile, then to apply for leave to cross-examine on the ground of hostility. But one prisoner is not entitled as of right to cross-examine another.

LORD ALVERSTONE C.J. The question for decision in this case is, whether, where two prisoners are jointly indicted and are separately defended, and one prisoner elects to be sworn and to give evidence on his own behalf, and in the course of his evidence he gives evidence inculpating the other prisoner, counsel for the latter can cross-examine him, or whether he can only be cross-examined by counsel for the prosecution. Before considering how far the question is governed by authority, it is important to point out that, if the law does not prohibit it, it is obviously in the interests of justice that the cross-examination of one prisoner by counsel for the other prisoner should be allowed, because, where the evidence is very strong against both prisoners, counsel for the prosecution might not think it his duty to cross-examine the prisoner so strictly as counsel for the other prisoner would. Further, inasmuch as a prisoner in giving evidence may raise some new point inculpating the other prisoner as to which counsel for the prosecution has had no notice and has no instructions, counsel for the other prisoner would probably be able to cross-examine more effectively than counsel for the prosecution could do. There may also be cases in which the judge's direction to the jury that evidence given by one prisoner is not evidence against the other would not, in the absence of cross-examination, be an effective protection to the other prisoner. Therefore it is in the interests of justice that every opportunity of testing by cross-examination a prisoner's evidence against the other prisoner should be given.

Before coming to the Act of 1898 I think it will be convenient to consider how the law stood before that Act was passed. In *Reg.* v. *Woods* (1) two prisoners were indicted for manslaughter, and the counsel for one of them having addressed the jury, counsel for the second prisoner did the same and then called witnesses for the defence, whose evidence tended

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to shew negligence on the part of the first prisoner, and it was held that the counsel for the first prisoner had the right to cross-examine the witnesses called by the second prisoner, and then to address the jury a second time, confining his speech to comments on the evidence which the second prisoner had adduced against the prisoner for whom he appeared; and in *Reg.* v. *Burditt* (1) it was expressly decided that, where two prisoners were jointly indicted, and one of them called a witness who gave evidence criminatory of the other, the latter had the right by himself or his counsel to cross-examine the witness and to address the jury in reply upon the evidence given. The reasoning of Jervis C.J. in the latter case affords considerable assistance in coming to a conclusion in this case. The learned judge said: "The prisoner should certainly have been allowed to cross-examine and reply, because the witness called by Burditt gave evidence to criminate him, and that evidence became tacked, as it were, to the case for the prosecution." It seems to me that the learned judge recognised the fact that in criminal proceedings it is very difficult to make certain that the jury will keep distinct the evidence which has been given on behalf of the different prisoners, and, therefore, he says that the evidence in the case in question became tacked, as it were, to the case for the prosecution. He goes on to say: "We must not, however, be understood as deciding that when one prisoner calls a witness who does not criminate his fellow-prisoner, the latter would, in that case, have a right to cross-examine and reply."

Therefore, previously to the Act of 1898, the right of one prisoner to cross-examine the witnesses called by another prisoner and to address the jury on that evidence depended on whether or not the witnesses for the one had given evidence tending to incriminate the other. That being the existing state of the law, the Criminal Evidence Act, 1898, was passed, the object of which was to enable prisoners to be called as witnesses on their own behalf; but it was not intended that they should be called against their own wish, and, therefore, s. 1 provides that "Every person charged with an offence . . . .

(1) 6 Cox C. C. 458.

shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows—(*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application." I think that it occurred to the Legislature that cases might arise, where prisoners were jointly indicted, in which one prisoner might give evidence attacking the other prisoner, because clause (*f*) of s. 1, after limiting the right to cross-examine a prisoner, by providing that he shall not be asked questions tending to shew that he has committed other offences or is of bad character, goes on to remove that restriction in certain cases, one of which is, where the prisoner "has given evidence against any other person charged with the same offence." I think that the most ordinary case of that would be where there are two or more prisoners jointly indicted. I agree that the words also apply to a different case, namely, where the same offence has been the subject of other proceedings. But if it had been intended to exclude the case of one of two prisoners jointly indicted endeavouring by his evidence to impute guilt to his fellow-prisoner, I think that that would have been done in express terms. Speaking for myself, I think that the ordinary case of two or more persons being jointly indicted for the same offence is exactly the case where general cross-examination ought to be allowed.

But then it is said that, if in a case such as this there is to be unrestricted cross-examination of the prisoner, it must be by counsel for the prosecution, and not by counsel for the other prisoner. On this point the reasoning of Jervis C.J. in *Reg.* v. *Burditt* (1) helps us in our decision, because his reason for allowing cross-examination by the prisoner's counsel was that evidence had been given of which the prosecution could avail themselves, and, therefore, although originally given in defence of one prisoner, it became in fact evidence for the prosecution against the other.

I come to the conclusion, therefore, both on principle and on the analogy of the decisions before the Act, that a prisoner

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who has given evidence incriminating his fellow-prisoner has, in the words of the Act, given evidence against another person charged with the same offence, and that in these circumstances cross-examination on behalf of the other prisoner ought to be allowed.

LAWRANCE J. I am of the same opinion.

WRIGHT J. The only question is whether the evidence of one co-defendant given in self-defence is evidence which is legally admissible to inculpate the other defendant, because, if it is, it necessarily follows that the latter should be allowed to cross-examine. I can find nothing in the Act except s. 1 (*f*), (iii.), which tends to abrogate the ordinary common law rule—see *Reg.* v. *Payne* (1); *Allen* v. *Allen* (2)—that the evidence of one defendant cannot on a criminal trial be received as evidence either for or against another defendant, the reason being that otherwise there would be a great danger that one defendant would be tempted to exculpate himself at the expense of his co-defendant. I have had some doubt whether clause (*f*), (iii.), does get over the difficulty, but I think that it can be construed as dealing with evidence given by one prisoner, not only in his own defence, but also with the object of making a case against the other prisoner. If that is so, and I am not disposed to decide otherwise, it follows that there may be cross-examination of the one prisoner by the other.

BRUCE J. I agree with the Lord Chief Justice for the reasons which he has given.

KENNEDY J. I agree with the judgment of my Lord.

Convictions quashed.

Solicitor for prosecution: *Solicitor to the Treasury.*

Solicitors for prisoner Hadwen: *Van Sandau & Co., for Mills & Co., Huddersfield.*

Solicitors for prisoner Ingham: *Helliwell, Harby & Co., for Jubb, Booth & Helliwell, Halifax.*

(1) (1872) L. R. 1 C. C. 349. (2) [1894] P. 248, at p. 253.

F. O. R.

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Feb. 26.

Adulteration—Butter—Sale to Prejudice of Purchaser—Butter blended with Milk—Notice in Shop—Label on Wrapper—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 8.

The appellants, a firm of provision merchants, displayed on the wall of their shop in a conspicuous position, so as to be visible to any one entering the shop, a large notice to the effect that their butter, as sold at that establishment, was choicest butter, blended with pure English full cream milk, by new and improved machinery, whereby it retained about 20 to 24 per cent. of moisture. A purchaser, who did not see the notice, and whose attention was not called to it, bought half a pound of shilling butter, which when handed to him was wrapped in two pieces of paper; on the inside paper or wrapper was printed a notice similar to that hung up in the shop, the outer wrapper being a piece of plain opaque paper. When analyzed, the butter was found to contain 23·8 per cent. of water, which was 7·8 in excess of the natural amount of 16 per cent.:—

Held, that, assuming that only one kind of butter was sold in the shop, the seller was protected by the notice displayed on the wall of the shop, and the sale was not to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875:—

Semble, that the label on the inner wrapper in which the butter was delivered was not a sufficient notice by label within s. 8 of the Act.

Case stated by justices for the borough of Richmond (Surrey).

An information under s. 6 of the Sale of Food and Drugs Act, 1875, had been preferred by the respondent, an inspector under the Sale of Food and Drugs Acts for the borough of Richmond, against the appellants, who carried on business at (amongst other places) Richmond as grocers and provision merchants, charging them with unlawfully selling to the prejudice of the purchaser half a pound of one shilling butter, which was not of the nature, substance, and quality demanded, the same having had water added thereto to the extent of 7·8 per cent. of water beyond the usual limit of 16 per cent. of water natural to butter. At the hearing the justices convicted the appellants and imposed a fine of 20*l.* and costs, but stated a case for the opinion of the Court which was in substance as follows:—

On July 12, 1901, the respondent, R. A. Houghton, caused

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one A. E. Houghton to ask for and purchase on his behalf at the appellants' shop half a pound of one shilling butter for the purpose of analysis. Immediately after the purchase the respondent entered the shop, and A. E. Houghton handed the butter purchased by him to the respondent, who then and there in the shop divided the butter into three parts, one of which he sent to the public analyst; all the requirements of the statute in that behalf were complied with. The public analyst certified that the butter "contained 23·8 per cent. of water, which was 7·8 per cent. more water than the extreme limit of 16 per cent. natural to butter."

The butter purchased was handed by the assistant who sold it to A. E. Houghton, and by him to the respondent, wrapped in two pieces of paper. On the inside paper or wrapper there was printed in large type the words "Pearks' Butter," and underneath in much smaller type a statement that the butter was blended with pure English full cream milk, by new and improved machinery, whereby it retained about 20 to 24 per cent. of moisture. (1) The outside wrapper was a plain piece of paper. When the respondent took off the outside paper wrapper in the appellants' shop in order to divide the butter into three parts for the purpose of analysis, he saw that there was something printed on the inside wrapper, but did not read it, and his attention was not called to it.

It was proved by the appellants that it is a common practice in the trade to blend different kinds of butter, and that the

(1) The notice on the wrapper was in the following terms: "Pearks' Butter. This is choicest butter, blended with pure English full cream milk, by new and improved machinery, whereby it retains about 20 to 24 per cent. of moisture, and acquires that delicacy of flavour which has made Pearks' butter so famous. This package weighs half-pound including wrapper."

The notice referred to in the case as being displayed in the shop was as follows:—

"NOTICE.

"Pearks' Butter, as sold at this establishment, is choicest butter, blended with English full cream milk, by new and improved machinery, whereby it retains about 20 to 24 per cent. of moisture, and acquires that delicacy of flavour which has made Pearks' butter so famous.

"By order.

"John Dumphreys, Secretary."

Copies of these notices were attached to and to be treated as part of the case.

process of blending adopted by the appellants was to put the butter into a churn with full cream milk, and that this was re-churned. Any excess of water in the butter in question was derived solely from the milk so added during the process of blending; no water was added separately to the butter. It was stated in evidence on behalf of the appellants that the object of blending the butter with milk was to give it uniform colour and flavour and to give it freshness; but there was no evidence that the milk was so added to the butter because it was required for the preparation of the butter as an article of commerce fit for carriage or consumption. The price of full cream milk was three farthings a pound.

In a frame on the wall behind the butter counter in the appellants' shop there was a printed notice in large letters to the same effect as the notice on the wrapper, stating that the butter sold in the establishment was blended with pure English full cream milk, whereby it retained about 24 per cent. of moisture. The butter counter faced the front of the shop, and the notice was visible to any one going into the shop, but the respondent did not observe it, and his attention was not called to it.

It was contended on behalf of the appellants that the inside paper wrapper in which the butter was handed to the purchaser was a label within the meaning of s. 8 of the Sale of Food and Drugs Act, 1875, that the printed notice in the shop was sufficient notice to the respondent apart from the label, and that there was no evidence of fraud. It was further contended that, as the wrapper and the printed notice in the shop accurately stated the nature and composition of the article sold, there was no evidence of a sale to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875.

It was contended by the respondent: (1.) That the sale was complete before he entered the shop, and that notice by label or otherwise was then too late. (2.) That as the butter was delivered in a piece of plain opaque paper which prevented the printing on the inside wrapper being visible until removed, and as the respondent did not in fact read it and did not purposely

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abstain from reading it, and his attention was not called to it, the inside wrapper did not constitute notice by label supplied at the time of delivering the article to the person receiving the same within the meaning of s. 8 of the Sale of Food and Drugs Act, 1875. (3.) That as he did not observe the notice on the wall in the shop, and his attention was not called to it, it was no notice to him at all.

The justices were of opinion: (1.) That the printed matter on the inside wrapper was in its terms inaccurate and misleading, and on that ground was not a sufficient notice by label within the meaning of s. 8 of the Sale of Food and Drugs Act, 1875, inasmuch as it stated the result of the blending to be to "retain" in the butter about 20 to 24 per cent. of "moisture," whereby it acquired delicacy of flavour, whereas the true and only result was to "add" 7·8 per cent. of "water" to the extreme limit of 16 per cent. natural to the butter. (2.) That for the like reasons the notice on the wall of the shop was not a sufficient notice. (3.) That as the butter was delivered in a piece of plain opaque paper, which until removed effectually concealed the inside wrapper and the printing thereon, and as the respondent did not in fact read the printing and did not purposely abstain from so doing, and having regard to the nature of the article asked for and to the fact that his attention was not called to the printing, the inside wrapper did not constitute a notice by label supplied at the time of delivering the article to the person receiving the same within the meaning of s. 8 of the Sale of Food and Drugs Act, 1875. (4.) That as the respondent did not observe the printed notice on the wall in the shop, and having regard to the nature of the article asked for and the fact that his attention was not called to the notice, the latter was no notice to him at all. (5.) That the sale of the article was complete before the respondent entered the shop, and that notice by label or otherwise was too late. (6.) That the excess of 7·8 per cent. of water found in the butter was added fraudulently to increase its bulk and weight, and that on that ground also notice by label or otherwise was no protection to the appellants. They therefore convicted the appellants.

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The questions for the opinion of the Court were:—

(1.) Whether the inside wrapper in which the butter was delivered was a sufficient notice by label within the meaning of s. 8 of the Sale of Food and Drugs Act, 1875.

(2.) Whether upon the facts stated there was sufficient notice otherwise than by label to the purchaser of what he was purchasing.

(3.) Whether upon the facts stated there was any evidence that the excess of water in the butter was added fraudulently to increase the bulk and weight.

Asquith, K.C. (*Avory*, K.C., and *Bonsey* with him), for the appellants. The conviction was wrong. The sale was not to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875. (1) Where the seller brings to the purchaser's knowledge the fact that the article sold is not of the nature, substance, or quality of the article demanded, there is no offence under s. 6, and it is immaterial whether the fact is brought to his knowledge by means of a notice conspicuously fixed in the shop or by a label affixed to the article sold under s. 8: *Sandys* v. *Small*. (2) It is immaterial that the purchaser did not in fact see the notice; an ordinary purchaser not purchasing for analysis could have seen it, and would have had notice of the quantity of moisture in the butter sold to him. Further, there was notice under s. 8 to the purchaser by means of the inner label: in this respect the case cannot be distinguished from *Jones* v. *Jones* (3), where a notice round a tin of cocoa to the effect that it was mixed was held to

(1) By 38 & 39 Vict. c. 63, s. 6, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*. . . . ."

By s. 8, "Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed."

(2) (1878) 3 Q. B. D. 449.

(3) (1894) 58 J. P. 653.

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comply with s. 8, although at the time of sale the tin was wrapped in a piece of opaque paper, and the purchaser had no opportunity of seeing the notice. Under s. 9, which forbids the abstraction of any part of an article of food before sale without disclosure of the alteration to the purchaser, a notice pasted upon a tin of condensed milk and a notice displayed upon a counter at which milk was sold have respectively been held to amount to a disclosure of the alteration to the purchaser: *Platt* v. *Tyler* (1); *Spiers & Pond* v. *Bennett*. (2) Here, by a notice visible to any one going into the shop, the purchaser was clearly informed of the percentage of water which would be found in the butter sold to him: there was what would amount to a full disclosure under s. 9; and this negatives the contention that the sale was to the prejudice of the purchaser. [He also cited *Pope* v. *Tearle*. (3)]

Alexander Cunningham Glen, for the respondent. The previous case of *Pearks, Gunston & Tee* v. *Knight* (4) shews that this particular admixture of butter with an excessive quantity of moisture is not butter, and must not be sold as such, and under s. 24 of the Act the onus of establishing the fact that the mixing is not fraudulent is upon the seller; the appellants have not discharged that onus by proof of the notice displayed in the shop and the inner notice round the article sold. There was evidence of fraud on which the justices could properly act. The butter was sold in a double wrapper, the outer piece of paper being opaque, so that the purchaser could not see the inside paper containing the label; it is distinguishable from the sale of an article in a tin, upon which the purchaser would naturally expect to find a label. There is no evidence that the attention of the boy who made the purchase was ever called to the label or to the notice on the wall. The price of the added milk (three farthings a pound) is an element in the consideration of the question of fraud, for the admixture of a comparatively worthless article with the article sold with a view fraudulently to increase the bulk makes the sale one to the prejudice of the purchaser, a label being in that case no

(1) (1894) 58 J. P. 71.
(2) [1896] 2 Q. B. 65.
(3) (1874) L. R. 9 C. P. 499.
(4) [1901] 2 K. B. 825.

protection to the seller: *Liddiard* v. *Reece* (1); *Horder* v. *Meddings*. (2) The notice affixed is misleading and fraudulent, for the use of the word "retain" would lead a purchaser to believe that the amount of moisture retained is that which would be in butter made in the ordinary way, whereas the contrary is the case.

Asquith, K.C., in reply. It is obvious that s. 24 only casts the onus of proof upon the seller when he is relying upon s. 8, or upon a proviso or exception in s. 6; it does not relieve the prosecution of the burden under s. 6 of shewing that the sale was to the prejudice of the purchaser.

LORD ALVERSTONE C.J. This case is not satisfactorily stated. If the Court were satisfied that the substance sold was sold as butter and nothing else was said about it, there would be evidence of an offence under s. 6; that is in effect the decision in *Pearks, Gunston & Tee* v. *Knight* (3), in which case I should myself have come to the same conclusion. But that is not what we have here to consider. The substance asked for and purchased was a half-pound of shilling butter. If it were to turn out that there were various classes of butter in the appellants' shop, and that this was merely butter which was sold at a certain price—that is, at a different price to the other butters—I might have to give a very different effect to the notice displayed in the shop to that which under the circumstances I think should be given to it. I understand the facts to be that the appellants were selling one sort of butter only, blended butter; drawing as I do this conclusion from the facts appearing in the case, the case is different from that of a man selling various kinds of butter and putting up a notice like this with a view to his protection.

Three questions are left to the Court for its opinion: first, whether the inside wrapper was a sufficient notice by label under s. 8; secondly, whether the appellants were protected otherwise than by the wrapper; and, thirdly, whether there

(1) (1880) 44 J. P. 233. (2) (1880) 44 J. P. 234.
(3) [1901] 2 K. B. 825.

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was any evidence that the excess of water had been fraudulently added to the butter. Speaking for myself, I am not satisfied that, if an offence under s. 6 is made out, the appellants are right in their contention that the inner label protected them. Sect. 8 provides for the protection of the seller "if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed." If we were dealing with that section only, I should have to consider at greater length than now seems necessary the meaning of the words "not intended fraudulently to increase its bulk, weight, or measure," and I should also have to see whether at the time of delivery the purchaser was supplied with a notice to the effect that the article was mixed. In my opinion the delivery of the article with a notice printed on an inner label covered with an opaque wrapper would not be sufficient. *Jones* v. *Jones* (1) is not a sufficient authority on the facts of the present case. There the article sold was a tin of cocoa, and it was assumed to be a matter of common knowledge that tins had labels on them, and, therefore, the fact that they were wrapped up when delivered to the purchaser could not prevent the label having the effect of a notice to the purchaser. The question of the sufficiency of the notice is one to be decided on the particular facts of each case; but I doubt whether a purchaser of a pound of butter, on being handed such a packet, could be taken to have notice that there was another label inside the outer wrapper. If, therefore, the inner label were the only defence relied upon by the appellants, I should not be prepared to say that their contention was right.

I now come to the important question in the case, whether there was sufficient notice to the purchaser otherwise than by the label; and, to decide this question, we must be careful to see what has really been found by the justices. They have found that the larger notice, the language of which was almost identical with that of the inner label, was hanging on the wall of the shop behind the butter counter, and that it was visible

(1) 58 J. P. 653.

to every one going into the shop. As I understand it, this is a finding that an ordinary purchaser going into the shop to buy this butter would see the notice on the wall, and that is not qualified by the statement that the respondent did not see it, and that his attention was not called to it. In connection with this it is not unimportant to remember that the respondent did not go into the shop as a mere purchaser: he went in, after getting the butter from his subordinate, in order to divide the butter into three portions, and otherwise comply with the requirements of the Act. If the finding is intended to mean that the notice would not come to the attention of an ordinary purchaser, I am unable to understand why the words used should be that the notice was visible to any one going into the shop. It is impossible, in my judgment, after reading this notice, to assume that it only applied to one kind of butter sold in that shop; it applied to all Pearks' butter as sold in Pearks' shop. Similarly, I think that the sale cannot be taken to have been a sale of one of many classes of butter; it was a sale of Pearks' butter, meaning the same thing as Pearks' butter in the notice. That being so, we are bound by *Sandys* v. *Small* (1) and *Spiers & Pond* v. *Bennett* (2), which decided that, where at the time of sale it is brought to the knowledge of the purchaser (not necessarily orally) that the article sold is blended or mixed, the sale cannot be said to be to the prejudice of the purchaser within the meaning of s. 6. No question arises here under s. 24, which in the case of the sale of an article of food in a mixed state places upon the seller the onus of proving that he comes within any exception contained in the Act; the prosecution has here to prove that the sale was to the prejudice of the purchaser. It is, I think, both good law and good sense that, if the purchaser has notice that what he is buying is blended butter, he is not entitled to say, for the purpose of a prosecution under s. 6, that he was prejudiced because he was not supplied with butter—that is, butter not mixed with anything at all. It is true that the label is not very happily worded: to a person who understands the chemistry of butter it would be wrong to say that it "retains" 20 to 24 per cent.

(1) 3 Q. B. D. 449. (2) [1896] 2 Q. B. 65.

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of moisture; but to an ordinary purchaser (who, under the decision in *Sandys* v. *Small* (1), is the person to be considered) it would be a statement that the butter was mixed with milk and had in it 20 to 24 per cent. of moisture. In any event, no supposed misstatement in the notice can do away with the broad statement in the notice that the butter sold in that shop was as therein described. Our answer to the second question should therefore be that there was no evidence upon which the justices could properly come to the conclusion that the sale was to the prejudice of the purchaser.

The third question is, in my opinion, immaterial. If we had merely to consider the conclusion to which the justices came on this point, I should have a difficulty in holding that we were not bound by their finding, because, though there may be no direct evidence of fraud, they did in fact find that the milk had been added to the butter in order fraudulently to increase its bulk and weight. But when once the conclusion is arrived at that there is no offence under s. 6, this question of a supposed fraudulent addition does not arise at all. If the justices meant to ask us whether there was any evidence to justify their finding, I can certainly see none in the case, for it merely gives us the reasons of the respondent, and does not set out any evidence upon the other side. But I should hesitate to overrule that finding if it were essential that we should consider it. For the reasons I have given, I think that there was no sale to the prejudice of the purchaser, and that this appeal should be allowed.

DARLING J. I am of the same opinion. But I think that the appellants have sailed very near the wind, and in my view they are saved entirely by the notice that was displayed in the shop; if they had relied only upon the label that was upon the butter, I think they would not have brought themselves within the protection of the Act. I do not say a word against the decision in *Jones* v. *Jones* (2), for what was done here does not bring this case within the principle of that decision. There Mathew J. said, "The paper covering was merely the usual

(1) 3 Q. B. D. 449. (2) 58 J. P. 653.

way of giving the article to a purchaser." No one could say that it was the usual way of selling butter to put it in a piece of paper which described it as mixed or blended, and then to wrap round it an opaque piece of paper which would prevent the purchaser from reading what was on the inside label. Mathew J. went on to say, "The article has been sold so mixed for thirty years, and must have been well known to purchasers. To say that there was no label because of its being wrapped up is an absurdity." That differentiates that case from the present; I will not indeed say that there is here no label, but it is wanting in nearly all the elements which were present in *Jones* v. *Jones*. (1) Here, as I understand the facts, the label was not put on at the time of the delivery of the butter, but the butter was kept wrapped up in the paper with the label printed on it, and at the time of delivery another wrapper was put round it. Had it not been for the large notice on the wall, I should not have been inclined to find fault with the view of the justices that the outer wrapper was put on with a fraudulent intent. Even as it is, the wording of the large notice is to my mind suspicious; but I cannot say that it convinces me that this butter was manipulated with a view fraudulently to increase its bulk, and there is no other evidence of fraud. No doubt that notice was drawn with the view of avoiding the effect of the previous decision. On the whole I agree that this appeal should be allowed.

CHANNELL J. I agree. The substance sold appears to have been a thing which might be legitimately dealt in, but it was not butter, and therefore in *Pearks, Gunston & Tee* v. *Knight* (2) the Court held that, where a substance of that nature was sold as butter, an offence had been committed against s. 6 of the Act of 1875, and that the sale under such circumstances was to the prejudice of the purchaser, although it would be legitimate to sell the substance under certain restrictions. One of the questions for us in the present case is whether there was sufficient evidence of a sale to the prejudice of the purchaser—whether the butter was in fact sold as blended

(1) 58 J. P. 653. (2) [1901] 2 K. B. 825.

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Channell J.

butter or merely as butter. It is obvious that the appellants had taken steps which were intended to meet the previous decision against them, and that the sale was intended to be a sale of blended butter. Both the notices so describe the article sold, and then go on to say that it contains more than the usual percentage of moisture. If the sale was made upon those documents, it was in my opinion clearly a sale of blended, and not of ordinary, butter. The difficulty in these cases of sale to the prejudice of the purchaser, always arises from the fact that the prosecutor is an inspector who is buying for purposes of analysis and not for his own consumption; it is necessary, therefore, to look at all the circumstances and see whether, if he had been an ordinary purchaser, he would have been prejudiced. There is always the difficulty whether an ordinary purchaser would have seen the notice; an inspector would not be likely to look for it, and very likely he would honestly omit to notice it. But here there was a large notice which any one could have seen. Similar circumstances existed in the case of *Spiers & Pond* v. *Bennett* (1), and the Court held that there had been a sufficient disclosure of the alteration in the thing sold to satisfy the requirements of s. 9 of the Act of 1875. That is really sufficient to dispose of the case. But a question arises under s. 8 of the Act, whether this is a case in which the seller could protect himself by a notice; in other words, whether the blending was not done fraudulently in order to increase the bulk, weight, or measure of the butter, in which case the protection given by s. 8 would not attach. It is plain that the process of mixing milk with the butter was done intentionally in order to increase its bulk, weight, and measure; but it does not follow that it was done fraudulently, and to my mind the necessary element to make this a fraudulent process is entirely wanting. If the object of the mixing is to enable the seller to sell the mixture as butter and at the price of butter, of course it would be fraudulent; but if it is done in order to sell the article as blended butter, there is no evidence that it was done fraudulently to increase the bulk, weight, or measure. The justices in stating the case have omitted all

(1) [1896] 2 Q. B. 65.

matters which would shew the act to be fraudulent, and therefore the third question must be answered in favour of the appellants.

There remains only the first question. If the facts are as my brother Darling understands them to have been, I agree that there would not be a compliance with the requirements of s. 8; but I feel great uncertainty upon the case as stated whether these are the true facts. The case is, however, disposed of by our answer to the second question.

Appeal allowed, and conviction quashed.

Solicitors for appellants: *Neve, Beck & Kirby.*

Solicitor for respondent: *T. W. Weeding, Kingston-upon-Thames.*

W. J. B.

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May 3.

Adulteration—False Warranty—Jurisdiction of Justices—Place where Article purchased for Analysis—Successive Warranties—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 25, 27—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 20, *sub-ss.* 5, 6.

Proceedings for giving a false warranty in respect of an article of food cannot be taken, under s. 20, sub-s. 5, of the Sale of Food and Drugs Act, 1899, before a Court having jurisdiction in the place where the article in question was purchased for analysis, if the warranty was not given within the jurisdiction of that Court, unless it was given to the person from whom the article in question was purchased for analysis.

CASE stated by the justices of Middlesex sitting at Brentford.

The appellant was summoned for having, on September 14, 1901, at Acton, in Middlesex, given a false warranty in writing to the Great Western and Metropolitan Dairies, Limited, in respect of new milk sold by him as principal. The appellant, who was a farmer in Wiltshire, on September 14, 1901, sent a churn of milk to London consigned to the Dairies company at Paddington Station, where it was received by them. The churn had a label attached containing the words, "Warranted pure with all its cream," which was removed by the Dairies company at the station. That churn was delivered by the

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Dairies company, unopened and in the same state as when they received it, to one Dew, a milk-seller at Shepherd's Bush, in the county of London. The respondent, an inspector, purchased from the servant of Dew at Acton, in Middlesex, a pint of milk from that churn, which on analysis proved to be adulterated with 8 per cent. of water. The Dairies company delivered the milk to Dew under a contract in writing by which it was warranted to be pure with all its cream.

Dew's servant was summoned by the respondent before the justices at Brentford for selling the adulterated milk, and gave notice to the respondent under s. 25 of the Sale of Food and Drugs Act, 1875, as amended by s. 20, sub-s. 4, of the Sale of Food and Drugs Act, 1899 (1), and also to the Dairies company, that he intended to rely on the written warranty from the Dairies company; but no such notice was given to the appellant. The summons against Dew's servant was dismissed

(1) The Sale of Foods and Drugs Act, 1875 (38 & 39 Vict. c. 63):—

Sect. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution . . . ."

Sect. 27: "Every person who shall give a false warranty in writing to any purchaser in respect of an article of food or a drug sold by him as principal or agent, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding 20*l*."

The Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51):—

Sect. 20, sub-s. 5: "Where the defendant in a prosecution under the Sale of Food and Drugs Acts has been discharged under the provisions of s. 25 of the Sale of Food and Drugs Act, 1875, as amended by this Act, any proceedings under the Sale of Food and Drugs Acts for giving the warranty relied on by the defendant in such prosecution, may be taken as well before a Court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a Court having jurisdiction in the place where the warranty was given."

Sub-s. 6: "Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence, to a fine not exceeding 20*l*., for the second offence to a fine not exceeding 50*l*., and for any subsequent offence to a fine not exceeding 100*l*., unless he proves to the satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true."

upon the ground that he was entitled to the protection of s. 25 of the Act of 1875, as amended by s. 20, sub-s. 4, of the Act of 1899. The appellant did not appear, and was not represented at, and had no notice of, those proceedings. The Dairies company were then summoned before the justices at Brentford, under s. 27 of the Act of 1875 as amended by s. 20, sub-s. 6, of the Act of 1899, for having given a false warranty to Dew; and the Dairies company thereupon gave notice to the respondent and to the appellant that they intended to rely on the warranty given by the appellant. The summons against the Dairies company was dismissed upon the ground that the company was entitled to the protection of s. 25 of the Act of 1875, as amended by s. 20, sub-s. 4, of the Act of 1899.

The appellant was then summoned before the justices at Brentford, under s. 27 of the Act of 1875 as amended by s. 20, sub-s. 6, of the Act of 1899, for having, in the parish of Acton, given a false warranty to the Dairies company in respect of the milk sold by him to the company. Amongst other objections, the appellant objected that the offence was alleged in the summons to have been committed in the parish of Acton, but that the appellant had not committed any offence within the jurisdiction of the Court; that the warranty by the appellant to the Dairies company was given in Wiltshire, where the milk was placed on rail; and that the appellant gave no warranty to Dew. The justices held that the label warranty was given by the appellant in Wiltshire and remained affixed to the churn until removal by the consignees at Paddington; but that it was not for them to determine whether the appellant's warranty did or did not continue while the milk remained in bulk in an unopened churn during the transit in the ordinary course of trade by the Dairies company to Dew's shop in Acton, in the county of Middlesex, inasmuch as s. 20, sub-ss. 5, 6, of the Act of 1899 gave them jurisdiction wherever a false warranty was given, and over every person who wrote such false warranty. The appellant was convicted.

The question for the opinion of the Court was whether the justices were right in so holding, and in convicting the appellant.

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Morton Smith, for the appellant. The justices had no jurisdiction to entertain these proceedings, because the offence was not committed in any place within their jurisdiction. The warranty given by the appellant was given either in Wiltshire or at Paddington Station, and in either case the offence of giving a false warranty was not committed in the county of Middlesex. The case is not within s. 20, sub-s. 5, of the Sale of Food and Drugs Act, 1899, and the justices at Brentford had no jurisdiction under that section. Sect. 20, sub-s. 5, applies only to proceedings for giving the warranty upon which the person who has been prosecuted by the original prosecutor relies. Sect. 25 of the Sale of Food and Drugs Act, 1875, only makes a written warranty a defence in the case of a defendant who has purchased the article "as the same in nature, substance, and quality as that demanded of him *by the prosecutor*." The written warranty given by the appellant to the Dairies company was, therefore, not a defence in the proceedings taken against them for giving a false warranty; their defence was, under s. 20, sub-s. 6, of the Act of 1899, that they "had reason to believe that the statements contained therein were true," and the warranty given to them by the appellant was only evidence in support of that defence. The Dairies company, therefore, were not "discharged under the provisions of s. 25" of the Act of 1875, within the meaning of s. 20, sub-s. 5, of the Act of 1899, and these justices had no jurisdiction. The justices seem to have thought that the defence of the Dairies company was under s. 25 of the Act of 1875, and upon that ground held that they had jurisdiction under s. 20, sub-s. 5, of the Act of 1899. The defence given by s. 25 of the Act of 1875 relates only to the original prosecution by the person who has purchased the milk and has had it analyzed, and, therefore, s. 20, sub-s. 5, of the Act of 1899 applies only to proceedings against the person who has given a false warranty to the person who sells to the original prosecutor. [He referred to *Reg.* v. *Smith*. (1)]

L. Richards (*J. C. Earle* with him), for the respondent. The justices had jurisdiction to entertain these proceedings.

(1) [1896] 1 Q. B. 596.

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By s. 20, sub-s. 5, of the Act of 1899, "where the defendant in a prosecution under the Sale of Food and Drugs Acts has been discharged under the provisions of s. 25" of the Act of 1875, proceedings for giving the warranty relied on by the defendant may be taken in the place where the milk was purchased for analysis. The Dairies company were defendants in a prosecution under the Acts, and s. 25 of the Act of 1875 provides that "the defendant in any prosecution under this Act" may rely on a warranty as a defence. The Dairies company did rely on the warranty given by the appellant, and they were discharged under the provisions of s. 25, and, therefore, this case is within s. 20, sub-s. 5, of the Act of 1899.

LORD ALVERSTONE C.J. In this case the important question is raised whether the justices, before whom the proceedings were taken, had jurisdiction to hear the charge against the original seller of the milk. The case is important, because it may be desirable that all proceedings in respect of the same milk should be heard before the same justices. In *Reg.* v. *Smith* (1) it was decided that, apart from some special legislation, a magistrate had no jurisdiction to hear a charge under s. 27 of the Sale of Food and Drugs Act, 1875, when the warranty was given and the milk was sold and delivered outside the jurisdiction of his Court. Then, by the Sale of Food and Drugs Act, 1899, the jurisdiction was extended, and, if these proceedings were really within s. 20, sub-s. 5, of the Act of 1899, this objection to the jurisdiction of the justices must fail. Sect. 20, sub-s. 5, provides that "where the defendant in a prosecution under the Sale of Food and Drugs Acts has been discharged under the provisions of s. 25 of the Sale of Food and Drugs Act, 1875, as amended by this Act, any proceedings under the Sale of Food and Drugs Acts for giving the warranty relied on by the defendant in such prosecution may be taken as well before a Court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a Court having jurisdiction in the place where the warranty was given."

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Lord Alverstone C.J.

Turning back to s. 25 of the Act of 1875, we find that it provides that "if the defendant in any prosecution under this Act prove . . . . that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor and with a written warranty to that effect . . . . he shall be discharged from the prosecution." Therefore s. 25 deals with the special individual who has sold the milk to the prosecutor. Then s. 20, sub-s. 1, of the amending Act of 1899 provides that a warranty shall not be available as a defence to any proceedings under the Acts unless the defendant has sent the purchaser a copy of the warranty, with a written notice that he intends to rely on it, and giving the name and address of the person from whom he received it, and has also given a like notice to that person. Now it is quite clear that the justices in this case thought that the second proceedings, against the Dairies company, were within s. 25 of the Act of 1875, or could be treated by them as being within that section. No doubt they so thought because the Dairies company set up the defence of a warranty from the present appellant. The information against the Dairies company was in fact for giving a false warranty under s. 27 of the Act of 1875 as amended by s. 20, sub-s. 6, of the Act of 1899. Sect. 20, sub-s. 6, gives to the defendant a statutory defence as follows: "unless he proves to the satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true." The Dairies company were, therefore, charged under s. 20 of the Act of 1899 with giving a false warranty, and their defence really was that they "had reason to believe that the statements and descriptions contained therein were true." That is quite a different defence from the defence, provided by s. 25 of the Act of 1875, that the article in question was purchased with a written warranty. Under s. 20, sub-s. 6, the warranty received by the defendant is only evidence that he had reason to believe that the warranty given by him was true. Therefore, although the justices thought that the Dairies company had been discharged under the provisions of s. 25 of the Act of 1875, yet they were really discharged under the provisions

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of s. 20, sub-s. 6, of the Act of 1899, and, consequently, the justices had no jurisdiction in this case under s. 20, sub-s. 5, of the Act of 1899. The justices, therefore, had no jurisdiction to entertain these proceedings, and this appeal must be allowed and the conviction quashed.

DARLING J. I am of the same opinion.

CHANNELL J. I am of the same opinion. By the Act of 1899 the Legislature intended to remedy defects in procedure under the Acts and, among others, to remedy the defect, pointed out in *Reg.* v. *Smith* (1), which raised the difficulty in proceedings in respect of a false warranty which was relied upon by the defendant in the original proceedings. That defect was remedied by s. 20, sub-s. 5, of the Act of 1899, but the Legislature did not consider the case of successive warranties and did not provide for it.

Appeal allowed. Conviction quashed.

Solicitors for appellant: *W. T. Ricketts & Son.*
Solicitor for respondent: *Sir Richard Nicholson.*

(1) [1896] 1 Q. B. 596.

J. F. C.

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ADULTERATION—*Butter—Sale to Prejudice of Purchaser—Butter blended with Milk—Notice in Shop—Label on Wrapper — Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 8.

The appellants, a firm of provision merchants, displayed on the wall of their shop in a conspicuous position, so as to be visible to any one entering the shop, a large notice to the effect that their butter, as sold at that establishment, was choicest butter, blended with pure English full cream milk, by new and improved machinery, whereby it retained about 20 to 24 per cent. of moisture. A purchaser, who did not see the notice, and whose attention was not called to it, bought half a pound of shilling butter, which when handed to him was wrapped in two pieces of paper; on the inside paper or wrapper was printed a notice similar to that hung up in the shop, the outer wrapper being a piece of plain opaque paper. When analyzed, the butter was found to contain 23·8 per cent. of water, which was 7·8 in excess of the natural amount of 16 per cent. :—

Held, that, assuming that only one kind of butter was sold in the shop, the seller was protected by the notice displayed on the wall of the shop, and the sale was not to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875.

Semble, that the label on the inner wrapper in which the butter was delivered was not a sufficient notice by label within s. 8 of the Act. PEARKS, GUNSTON & TEE, LIMITED *v.* HOUGHTON
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Proceedings for giving a false warranty in respect of an article of food cannot be taken, under s. 20, sub-s. 5, of the Sale of Food and Drugs Act, 1899, before a Court having jurisdiction in the place where the article in question was purchased for analysis, if the warranty was not given within the jurisdiction of that Court, unless it was given to the person from whom the article in question was purchased for analysis. MANNERS *v.* TYLER - - - **Div. Ct. 901**

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Proceedings under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, against the original vendor of an article of food or drug for giving a false warranty in writing in respect of it to a purchaser, must be commenced within six calendar months from the date of the giving of the false warranty. WHITAKER *v.* POMFRET BROTHERS
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An action was brought for breach of a written contract which contained an agreement to refer matters in dispute between the parties. The defendant attended at chambers on the hearing of a summons for directions taken out by the plaintiffs, on which an order was made that the plaintiffs and defendant should respectively make discovery of documents. The defendant subsequently applied under s. 4 of the Arbitration Act, 1889, for a stay of proceedings:—

Held, that the defendant had taken a step in the proceedings, and was, therefore, not entitled to a stay. COUNTY THEATRES AND HOTELS, LIMITED *v.* KNOWLES - - - C. A. 480

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ASSIGNMENT OF DEBT—*Indefinite Amount—Right of Assignee to Sue—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

By an assignment in writing K., in consideration of an advance, assigned to the plaintiff "so much and such part of my income, salary, and other emoluments from H." (the defendant, in whose employment he then was) "as shall be necessary and requisite for payment to you of the sum of 22*l.* 10*s.*, or of any further or other sums in which I may hereafter become indebted to you." In an action by the plaintiff as assignee to recover two months' salary due from the defendant to the assignor, who in turn was alleged to be then indebted to the plaintiff in a larger amount:—

Held, that the assignment, not being of a definite and ascertained amount, was not such an assignment as was contemplated by s. 25, sub-s. 6, of the Judicature Act, and that the plaintiff could not maintain the action in his own name.

Quære, whether an assignment of an ascertained part of a debt is within the section. JONES *v.* HUMPHREYS - - Div. Ct. 10

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BANKER—*Cheque—Conversion—Crossed Cheque paid in to Customer's Account—Forged Indorsement—Credit given to Customer before Cheque cleared—Receipt of Payment by Banker—Banker not acting merely as Agent for Collection—Cheque*

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crossed by the Collecting Banker—Draft by one Branch of Bank on another—Crossed Cheque paid in to Account of Customer of Bank on which Cheque is drawn—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 3, *sub-s.* 1; *ss.* 60, 73; *s.* 77, *sub-s.* 6; *s.* 79, *sub-s.* 2; *ss.* 80, 82—*Revenue Act*, 1883 (46 & 47 *Vict. c.* 55), *s.* 17.

Bankers are entitled to the protection given by s. 82 of the Bills of Exchange Act, 1882, only in cases where they receive payment of a crossed cheque as agents for collection for a customer. They are not entitled to that protection where they receive the cheque under such circumstances as to constitute them holders of it on their own account. Therefore, where bankers credit a customer with the amounts of cheques as soon as they are paid in to his account, and allow him to draw against the amounts so credited before the cheques are cleared, they are not entitled to the protection given by s. 82.

The above-mentioned section only applies to cheques which are crossed before they come into the bankers' possession, and the bankers cannot by afterwards crossing the cheques themselves become entitled to the protection given by the section.

A banker's draft addressed by one branch of a bank to another branch of the same bank is not a cheque within the meaning of ss. 60, 82 of the Bills of Exchange Act, 1882; nor is it within s. 17 of the Revenue Act, 1883.

Cheques drawn upon a branch of the defendants' bank by customers of the defendants, payable to the order of the plaintiff, and crossed, were stolen from the plaintiff by a clerk in his employ, who had an account with another branch of the defendants' bank. The clerk forged the plaintiff's indorsement on the cheques, and paid them in to his own account. The cheques were collected by the ordinary book-keeping process of debit and credit at the defendants' head office, and their amounts were placed to the credit of the clerk, who drew cheques against the same which were duly paid. The defendants so dealt with the stolen cheques in good faith and in the ordinary course of business. In an action by the plaintiff against the defendants for conversion of the cheques:—

Held, that the defendants were, notwithstanding the provisions of s. 79, sub-s. 2, of the Bills of Exchange Act, 1882, protected from liability to the plaintiff in respect of the cheques by the provisions of s. 60 of that Act. GORDON *v.* LONDON, CITY AND MIDLAND BANK, LIMITED. GORDON *v.* CAPITAL AND COUNTIES BANK, LIMITED **C. A. 242**

BANKRUPTCY—*Building Agreement—Chattels "to be deemed annexed to the Freehold"—Mortgage of Building Agreement—Mortgagee empowered to take Possession if Builder should "become Bankrupt"—Bankruptcy of Builder—Reputed Ownership of Chattels—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

A building agreement provided that all the loose materials and plant brought upon the land should "be deemed to be annexed to the freehold." The builder by deed assigned "all his interest under the building agreement" to H. to secure advances. This deed provided that, if the builder should "become bankrupt," H. might take possession of the land comprised in the building agreement and complete any unfinished houses. A receiving order was afterwards made against the builder, and adjudication followed. H. took possession under the mortgage when the receiving order was made, on the ground that the builder had "become bankrupt," and completed some unfinished houses, using the loose plant and materials then on the premises:—

Held, that "become bankrupt" meant "be adjudicated a bankrupt," and therefore that, the builder not being in default under the mortgage when the receiving order was made, H. was not then entitled to take possession:

Held, also, that the loose plant and materials on the land at the date of the receiving order were in the reputed ownership of the builder with the consent of the true owner, the freeholder, and passed to the trustee in bankruptcy.

The principle of *In re Ginger*, [1897] 2 Q. B. 461, applied. *In re* WEIBKING. *Ex parte* WARD **Wright J. 713**

2. —— *Chose in Action—Mortgage—Notice—Priorities.*

A trustee in bankruptcy, being under the bankruptcy laws only statutory assignee of the bankrupt's choses in action subject to all equities existing therein at the date of the commencement of the bankruptcy, cannot obtain priority over a good equitable mortgagee thereof for value merely by giving notice before the mortgagee. *In re* WALLIS. *Ex parte* JENKS **Wright J. 719**

3. —— *Interpleader—Execution Creditor—Property held on Trust—Trustee for Benefit of Creditors—Right of Indemnity out of Trust Estate—Lien passing to Trustee in Bankruptcy—Burden of Proof—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

The trustee under a creditors' deed was empowered by the deed to carry on a business for the benefit of the creditors. In so doing he incurred debts, for which he was personally liable. Judgment having been obtained against him for one of these debts, goods which were assets of the business were taken in execution under that judgment. The trustee having become bankrupt, these goods were claimed by his trustee in bankruptcy, and an interpleader issue was directed to try the title to them. Upon the trial of the issue no evidence was given as to the state of the account as between the bankrupt and the trust estate under the creditors' deed, and whether or not the bankrupt was in default to the estate:—

Held, affirming the judgment of a Divisional Court, [1901] 1 K. B. 108, that, the bankrupt being entitled to an indemnity out of the trust estate under the creditors' deed against liabilities incurred by him in carrying out the trusts of the deed, he had primâ facie a right to a lien on the goods, which passed to his trustee in bankruptcy, and therefore the claimant was entitled to succeed on the issue as against the execution creditor, who had no right to have goods held by the execution debtor upon trust taken in execution. JENNINGS *v.* MATHER. GRAY, CLAIMANT **C. A. 1**

4. —— *Landlord and Tenant—Assignment of*

BANKRUPTCY—*continued.*

Lease by Lessee—Act of Bankruptcy by Lessee—Relation back of Bankruptcy—Liability of Assignee for Rent due before Adjudication of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 43, 44, 54.

The lessee of premises assigned the lease with other property to the defendant by a deed which was an act of bankruptcy. The lessee was subsequently adjudicated bankrupt on that act of bankruptcy, and a trustee in bankruptcy was appointed, who disclaimed the lease. During the interval between the assignment of the lease and the date of the lessee's being adjudicated bankrupt, two quarters' rent of the premises accrued due under the lease. Before the lessee's bankruptcy the plaintiffs, who were the owners of the reversion upon the lease, sued the defendant, and recovered judgment against him, for the first quarter's rent. They had commenced an action for the second quarter's rent, when the lessee was adjudicated bankrupt, but the action did not come on for trial until after the adjudication:—

Held, that the defendant was liable for the rent, notwithstanding that the bankruptcy of the lessee had relation back to the act of bankruptcy. STEIN *v.* POPE - - - - **C. A. 595**

5. —— *Offences by Bankrupt under Bankruptcy Act—Prosecution—Report of Official Receiver—Consideration by Court—Filing of Report—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 16—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 31, 163, 164, 166.

When the official receiver in bankruptcy has reported to the Court that a bankrupt has committed offences under the Bankruptcy Act, it is the duty of the Court to consider the report, and, even if the official receiver does not ask for an order directing the prosecution of the bankrupt, to determine whether he ought to be prosecuted.

The Court, however, is not bound to determine the question at once, but it may adjourn the determination to a future time.

The Court ought not, simply because the official receiver does not ask for an order to prosecute the bankrupt, to decline to consider the report at all.

When the official receiver has made his report it ought to be filed. *In re* DUNN. *Ex parte* SENIOR OFFICIAL RECEIVER - - **C. A. 107**

6. —— *Order and Disposition—Building Agreement—Plant and Materials on Premises—Lien of Building Owner—Forfeiture of Plant by Builder after Bankruptcy—Protected Transaction.*

By a building contract made between a firm of builders and a school board, it was provided by clause 10 that all plant and materials brought on to the ground by the builders for the purposes of the building should be considered to be the property of the board, and that they should not be removed by the builders or any other person without the licence of the architect, but that the board should not be answerable for any loss or damage which might happen to them; and by clause 20 that, if the builders should delay the performance of their contract, the board might give the builders notice to proceed with the work, and that in the event of their not

BANKRUPTCY—*continued.*

doing so within seven days the plant, &c., should be forfeited to the board. The builders having become bankrupt, the board subsequently to the commencement of the bankruptcy gave to the builders and to their trustee notice under clause 20 to proceed with the work, and upon non-compliance with the notice, the board claimed that the plant and materials upon the premises were forfeited, and that they were entitled to retain them as against the trustee:—

Held, (1) that clause 10 of the contract did not vest the ownership of the goods in the board, and that consequently they were not in the order and disposition of the debtors by the consent of the "true owner" within the meaning of s. 44 of the Bankruptcy Act, 1883, and did not pass to the trustee as being in the reputed ownership of the debtors; (2) that the board's right to issue the notice under clause 20 was unaffected by the bankruptcy; and that although the goods were the property of the debtors at the commencement of the bankruptcy, the title of the trustee was determined by the forfeiture, and the board were entitled to retain them. *In re* KEEN & KEEN. *Ex parte* COLLINS - - - **Div. Ct. 555**

7. —— *Petition—Evidence—Admissibility—Evidence of Debtor—Debtor's Books.*

On the hearing of a bankruptcy petition the petitioning creditor is entitled to production of the debtor's books for the purpose of proving the allegations in the petition.

The Court of Appeal also expressed their opinion that on the hearing of a bankruptcy petition the petitioning creditor is entitled to call the debtor himself as a witness in support of the petition, on the ground that, now that a debtor can petition for an adjudication of bankruptcy against himself, bankruptcy proceedings can no longer be considered as of a quasi-criminal nature. *In re* X. Y. *Ex parte* HAES **C. A. 98**

8. —— *Receiving Order—Debtor—Scheme of Arrangement—Creditor—Withdrawal of Debt—Release—Security—Undue Preference—Knowledge of Debtor—Composition—"Debts provable"—Approval of Scheme—Conduct of Debtor—Official Receiver's Report—Misconduct—"Rash and hazardous Speculation"—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-ss.* 7, 8, 9, 10.

Where a scheme of arrangement is submitted by a debtor under s. 3 of the Bankruptcy Act, 1890, and part of the arrangement is that certain creditors withdraw their debts, the Court will not refuse its sanction to the scheme merely on the ground that the withdrawals are on terms giving those creditors an advantage over the other creditors, provided that the withdrawals have not been obtained by the debtor himself, or by any person with the knowledge and on behalf of the debtor.

Thus, a scheme of arrangement submitted by a debtor against whom a receiving order had been made secured payment to the unsecured creditors, except two who had withdrawn their debts, of a sum of not less than 7*s.* 6*d.* in the pound, as required by s. 3, sub-s. 9, of the Act. The withdrawals had been obtained by the debtor's brother, who had, but without any knowledge whatever on the part of the debtor him-

BANKRUPTCY—*continued.*
self, given them a security placing them, it was said, in a better position than the other creditors under the scheme:—

Held, that, as the security given to the two withdrawing creditors was, neither in form nor in substance, the result of any bargain made by or with the knowledge of the debtor himself, it was not a ground for the Court refusing to sanction the scheme.

The expression "debts provable" in s. 3, sub-s. 9, of the Bankruptcy Act, 1890—which requires that a scheme of arrangement shall, as a condition for its approval by the Court, provide reasonable security for payment of not less than 7*s.* 6*d.* in the pound "on all the unsecured debts provable against the debtor's estate"—means "debts provable," not at the date of the receiving order, but at the time when the scheme comes before the Court for approval, and, therefore, does not include debts which may have previously been withdrawn or released.

Misconduct on the part of a debtor, to be sufficient to justify the Court in refusing its sanction to a scheme under s. 3, sub-s. 9, must be of a gross character, or such as would make the sanction contrary to public policy. The mere fact that the official receiver has found in his report made under sub-s. 7 that the debtor has contributed to his failure by "rash and hazardous speculation" is not by itself a sufficient ground for refusal. *In re* E. A. B. - - **C. A. 457**

—— Bill of sale—Mortgage or hire-purchase agreement - - - - **137**
See BILL OF SALE. 1.

—— Misappropriation by trustee—Evidence—Statement of affairs in bankruptcy—Admissibility - - - **552**
See CRIMINAL LAW. 4.

BARRISTER—Compromise of action—Agreement to refer—Authority exceeded by counsel - - - - **838**
See PRACTICE. 6.

BETTING—House used for—Receipt of money beyond the United Kingdom - **353**
See GAMING.

BILL OF EXCHANGE—Cheque—Draft by one branch of bank on another - **242**
See BANKER.

—— Inchoate instrument—Negotiation - **361**
See PROMISSORY NOTE.

BILL OF LADING—Exceptions—Intentional letting in of sea-water—Negligent mistake **290**
See SHIPPING.

BILL OF SALE—*Mortgage or Hire-purchase Agreement—Bankruptcy—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9.

In 1899 A. contracted with B. to purchase an hotel and the chattels in and about the same for a lump sum of 30,000*l.* A., being short of money, went to C. and asked for a loan of 2000*l.* on a fourth mortgage of the hotel. C. declined the mortgage, and A. refused to give a bill of sale. On the morning of the day for completion of A.'s contract, C. went to B., told him that A. was short of money, and offered to buy the chattels for 2000*l.* B. accepted this offer, and C. paid him the money. C. then purported to sell the chattels to A. on a hire-purchase agreement for 2412*l.* 16*s.*, payable by instalments, and the purchase of the hotel was completed. The hire-purchase agreement was in common form and contained the usual licence to seize. In 1900 A. became bankrupt, and his trustee in bankruptcy claimed the chattels as part of the property of the bankrupt:—

Held, that the true inference from all the facts was that the 2000*l.* was a loan by C. to A. to enable him to complete his contract with B.; and that the hire-purchase agreement was a security for that loan and was void for want of registration under the Bills of Sale Acts.

Beckett v. *Tower Assets Co.*, [1891] 1 Q. B. 638, followed. MELLOR'S TRUSTEE *v.* MAAS & CO.
Wright J. 137

2. —— *Validity—Form in Schedule—Bill of Sale given by two Grantors—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Schedule.*

By a bill of sale two persons jointly and severally assigned goods described in a schedule thereto, to secure repayment of an advance. The goods so described did not any of them belong to the grantors jointly, but some belonged to one of them and the rest to the other. The schedule did not specify to which grantor the goods respectively belonged:—

Held (affirming the decision of a Divisional Court, [1901] 1 K. B. 70), that the bill of sale was void as not being in accordance with the form in the schedule to the Bills of Exchange Act (1878) Amendment Act, 1882. SAUNDERS *v.* WHITE - - - - - **C. A. 472**

BLACKBURN — Blackburn Improvement Act, 1882—Street—Paving—"Back roads"—"Cross roads" - - - **794**
See LOCAL GOVERNMENT. 3.

BOARDING-HOUSE KEEPER—Water—Supply—"Domestic purposes" - - **310**
See WATER.

"BOND OR COVENANT" — Stamp duty—"Lease"—Purchase of electrical energy from lessors - - - **441**
See REVENUE. 4.

BOOKS—Bankruptcy petition—Evidence—Admissibility—Debtor's books - **98**
See BANKRUPTCY. 7.

BREAD—*Sale otherwise than by Weight*—3 *Geo.* 4, *c. cvi., s.* 4.

By 3 Geo. 4, c. cvi., s. 4 (which applies in substance to the metropolitan area), any baker or seller of bread who sells, or causes to be sold, bread in any other manner than by weight is liable to a penalty.

A servant of the respondent, a baker, was asked by a purchaser for a half-quartern loaf, and served him with a loaf and two rolls, for which he paid 2*d.* The loaf and rolls were in the purchaser's presence placed in the pan of a pair of scales, in the opposite scale of which there was already a 2 lb. weight; the beam of the scales did not move, and the weight of the loaf and rolls

BREAD—*continued.*
was not ascertained at the time of sale beyond the clear fact that they weighed less than 2 lbs. On being taken away by the purchaser and weighed, they were found to weigh 5 ozs. short of 2 lbs.:—
Held, that a sale by weight meant a sale by the true weight of the bread sold, and that the respondent had sold bread otherwise than by weight within the meaning of the section. Cox *v.* BLEINES - - - - Div. Ct. 670

BROKER — Stock Exchange — Client's account closed by broker—Anticipatory breach —Damages - - - - 482
See CONTRACT.

BUILDER—Mortgagee empowered to take possession if builder should "become bankrupt" - - - - 713
See BANKRUPTCY. 1.

BUILDING—Agreement—Forfeiture of plant by builder after bankruptcy — Protected transaction - - - - 555
See BANKRUPTCY. 6.

—— Height of building—Workmen's Compensation Act - - 211, 216, 494
See EMPLOYER AND WORKMAN. 3—5, 9, 31.

—— Offences—Erection of premises in advance of building line — Liability of new owner - - - - 646
See LOCAL GOVERNMENT. 2.

—— Transfer of powers from London County Council—Wooden structure - 326
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BUTTER—Blended with milk—Notice in shop—Label on wrapper - - - 889
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BY-LAW—Tramcars, Use of offensive language in—By-laws for prevention of nuisances —Validity - - - - 160
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CAPITAL — Stamp duty — Local authority — "Issue" of loan capital—Date of issue
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CASES — *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 638, followed - - 137
See BILL OF SALE. 1.

—— *Brigella, The*, [1893] P. 189, disapproved of
See INSURANCE, MARINE. 734

—— *Dickinson* v. *Harbottle*, (1873) 28 L. T. (N.S.) 186, overruled - - - 15
See LIGHT.

—— *Ginger, In re*, [1897] 2 Q. B. 461, applied
See BANKRUPTCY. 1. 713

—— *Hammersmith Vestry* v. *Lowenfeld*, [1896] 2 Q. B. 278, overruled - - 794
See LOCAL GOVERNMENT. 3.

—— *Kelk* v. *Pearson*, (1871) L. R. 6 Ch. 809, approved of and followed - - 15
See LIGHT.

—— *Knight* v. *Cubitt & Co.*, [1902] 1 K. B. 31, distinguished - - - 216
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—— *Lanfranchi* v. *Mackenzie*, (1867) L. R. 4 Eq. 421, overruled - - - 15
See LIGHT.

—— *Precious* v. *Abel*, (1795) 1 Esp. 350, commented on - - - - 745
See MASTER AND SERVANT.

—— *Reg.* v. *Denbighshire Justices*, (1885) 15 Q. B. D. 451, distinguished - 180
See RATES.

—— *Reg.* v. *Great Western Ry. Co.*, (1869) L. R. 4 Q. B. 323, followed - - 180
See RATES.

—— *Rimell* v. *Sampayo*, (1824) 1 C. & P. 254, commented on - - - 745
See MASTER AND SERVANT.

—— *St. John's College, Cambridge* v. *Pierrepont*, (1891) 61 L. J. (Q.B.) 19, overruled 532
See PRACTICE. 5.

—— *Solicitors Act*, 1843, *In re An Application under the*, (1899) 80 L. T. 720, disapproved of - - - - 128
See SOLICITOR.

—— *Tottenham Local Board* v. *Rowell*, (1876) 1 Ex. D. 514, distinguished - 794
See LOCAL GOVERNMENT. 3.

—— *West Ham Local Board* v. *Maddams*, (1876) 40 J. P. 470, distinguished - 794
See LOCAL GOVERNMENT. 3.

CERTIFICATE — Solicitor—Annual certificate—Duty of registrar of solicitors — Discretion - - - - 128
See SOLICITOR.

CHAMBERS—Appeal from order of judge at—Railways, Regulation of — "Practice and procedure" - - - 813
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CHARITY—Estate duty—Gift to a charitable society—Reservation of an annuity to donor—Bonâ fide purchase - 416
See REVENUE. 2.

CHEQUE — Draft by one branch of bank on another—Bill of exchange - 242
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CHOSE IN ACTION — Mortgage — Notice — Priorities - - - - 719
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CLUB — Offences — Selling by retail without licence—Sale to agent of member 666
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COACHMAN—Forage supplied by direction of—Authority to pledge credit of master 745
See MASTER.

COAL MINES—Agent of mine—Liability for contravention of general rule by manager
See JUSTICES. 1. 857

—— "Workman"—Contract by workman with mine-owner to obey regulations - 505
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COMMON—User in excess of right of—Jurisdiction—Summary conviction on charge of assault—Question as to title to an interest in land - - - 637
See JUSTICES. 3.

COMPANY—*Practice—Service of Summons on Limited Company—Sale of Food and Drugs Acts—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 62.

A summons to appear to an information under the Food and Drugs Acts can only be served on a limited company in the manner prescribed by s. 62 of the Companies Act, 1862, by being left at or sent to the registered office of the company. PEARKS, GUNSTON & TEE, LIMITED *v.* RICHARDSON Div. Ct. 91

—— Foreign company carrying on business temporarily in England—Service of writ within the jurisdiction - - 342
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COMPENSATION — Appeal—Railways, Regulation of—"Practice and procedure" 813
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—— Appeal to High Court—Order under s. 5 of Workmen's Compensation Act, 1897 880
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—— Condition precedent—Tenant—Title 874
See LANDS CLAUSES ACTS.

—— To officer on abolition of office—Practice of Treasury—Discretion of council - 317
See LOCAL GOVERNMENT. 1.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

COMPROMISE—Counsel's authority—Agreement to refer—Authority exceeded by counsel
See PRACTICE. 6. 838

CONDITION — Arbitration — Workmen's Compensation Act—Condition precedent to jurisdiction of arbitrator - - 47
See EMPLOYER AND WORKMAN. 2.

—— Precedent—Compensation—Tenant—Title
See LANDS CLAUSES ACTS. 874

—— Precedent—Poor-rate—Appeal - 180
See RATES.

CONSISTORY COURT.
See under ECCLESIASTICAL LAW.

CONSPIRACY—Publication of articles in newspapers affecting character and conduct of persons in course of trial - 77
See CRIMINAL LAW. 7.

CONTRACT—*Measure of Damages—Contract to carry over Stock on the Stock Exchange—Client's Account closed by Broker—Anticipatory Breach—Period with reference to which Damages to be calculated.*

The defendants, who were stockbrokers, agreed with the plaintiff to carry over to the end of May account on the Stock Exchange certain stocks which they had purchased for him, and made the necessary arrangement with jobbers for that purpose. Before the settling day arrived they closed the plaintiff's account without instructions by selling the stocks. Upon being informed of the closing of his account, the plaintiff gave the defendants notice that he should insist on performance by them of their contract when the settling day arrived. At the time when the defendants closed the plaintiff's account the prices of the stocks were falling, but

CONTRACT—*continued.*

shortly afterwards they rose again, and they were higher at the end of May settlement, having been still higher during the interval between the closing of the plaintiff's account and the end of May settlement. In an action brought before Wills J., [1901] 2 K. B. 867, by the plaintiff against the defendants after the end of May settlement for non-performance of their contract to carry over the stocks, the defendants contended that the damages ought to be assessed with reference to the prices of the stocks when the defendants closed the plaintiff's account, and that so assessed they would be nominal:—

Held, that the defendants' contention was incorrect, and that the plaintiff was entitled to insist on performance of the defendants' contract at the end of May settlement, and to measure his damages with reference to the prices of the stocks at that date.

Query, whether the plaintiff had a right to have the damages estimated with reference to the highest prices at which the stocks had stood in the interval between the closing of the plaintiff's account and the end of May. MICHAEL *v.* HART & Co. - - - - C. A. 482

—— Breach of contract—Writ for service out of the jurisdiction - - - 867
See PRACTICE. 10.

CONTRACTOR—Sub-contractor, Workmen in employ of—Workmen's Compensation Act
See EMPLOYER AND WORKMAN. 5. 216

—— "Workman"—Contract by workman with mine-owner to obey regulations - 505
See EMPLOYER AND WORKMAN. 16.

COUNSEL—Compromise of action—Agreement to refer—Authority exceeded by counsel
See PRACTICE. 6. 838

CONVERSION—Cheque—Draft by one branch of bank on another—Bill of exchange 242
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CONVICTION — Game — Night poaching—Previous convictions—Person "so offending" a third time - - - 199
See CRIMINAL LAW. 5.

—— Proof of previous conviction—Prevention of crimes - - - - 547
See CRIMINAL LAW. 1.

CORPORATION—Foreign company carrying on business temporarily in England—Service of writ within the jurisdiction 342
See PRACTICE. 9.

—— Retainer of solicitors by resolutions not under seal—Subsequent affixing of seal
See LOCAL GOVERNMENT. 4. 601

COSTS—Action founded on tort—Agreement for lease of house—Removal of fixtures 612
See PRACTICE. 2.

—— "Action founded on tort"—Judgment for nominal damages and injunction 532
See PRACTICE. 5.

—— Discretion as to costs—Leave to appeal—Official referee — - - 643
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COSTS—*continued.*

—— Lease—Renewal "at costs of lessee"—Costs of reference and award as to amount of fine payable on renewal 512
See LANDLORD AND TENANT. 2.

—— Of local inquiry—Costs of parliamentary opposition - - - - 601
See LOCAL GOVERNMENT. 4.

—— Payment into court with denial of liability—Recovery of less than amount paid in—Costs of issues found for plaintiff 124
See PRACTICE. 4.

—— Power to order successful defendant to pay costs - - - - - 625
See COUNTY COURT. 3.

—— Workmen's Compensation Act, Assessment of compensation under - - 204
See EMPLOYER AND WORKMAN. 12.

COUNTY COURT—*Jurisdiction—Landlord and Tenant—Factory—Expense of complying with Requirement of Sanitary Authority—Factory and Workshop Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 7.

Where the lessor of a factory sues the lessee in the county court, on a covenant by the lessee to pay all charges and outgoings which may be charged or imposed on the lessor in respect of the premises, to recover the expenses to which he has been put in complying with the requirements of the sanitary authority under s. 7 of the Factory and Workshop Act, 1891, the county court judge has jurisdiction, whatever may be the legal effect and construction of the covenant, to make such order apportioning the expense between the parties as may seem just and equitable to him under all the circumstances of the case. MONK *v.* ARNOLD - - - - Div. Ct. 761

2. —— *Practice—Appeal—Order under s.* 5 *of Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37)—*Appeal to High Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

An appeal lies to the King's Bench Division against an order made by a county court judge under s. 5 of the Workmen's Compensation Act, 1897. KNIVETON *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY - Div. Ct. 880

3. —— *Practice—Costs—Power to order successful Defendant to pay Costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 113.

A county court judge has no power to order a successful defendant to pay the costs of the plaintiff. ANDREW *v.* GROVE - Div. Ct. 625

4. —— *Practice—Misdirection—Refusal of New Trial—Appeal to High Court.*

Although a party who appeals directly to the High Court against the judgment of a county court judge on the ground of misdirection is not entitled to be heard unless he took the objection to the judge's direction at the time of the trial, it is otherwise if he first applies to the county court judge for a new trial on the ground of misdirection, and then upon being refused appeals to the High Court against such refusal. It is enough that the objection to the direction is taken for the first time upon the application for a new trial to the county court judge. HANDLEY *v.* LONDON, EDINBURGH AND GLASGOW ASSURANCE COMPANY - - - - Div. Ct. 350

COUNTY COURT—*continued.*

—— Costs—Action founded on tort—Agreement for lease of house—Removal of fixtures
See PRACTICE. 2. 612

—— Costs—"Action founded on tort"—Judgment for nominal damages and injunction - - - - - 532
See PRACTICE. 5.

COURT OF RECORD OF CIVIL JURISDICTION—Appeal to the King's Bench Division
See INFERIOR COURT. 721

COVENANT—By lessee to pay and discharg "impositions charged or imposed in respect of the premises" - - 700
See LANDLORD AND TENANT. 1.

—— Stamp duty—"Bond or covenant"—"Lease" - - - - 441
See REVENUE. 4.

CREDITOR—Bankruptcy.
See Cases under BANKRUPTCY.

CRIMINAL LAW—*Charge of being in Public Place with Intention of committing Offence—Proof of Previous Convictions—Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *ss.* 7, 9—*Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 116.

On the trial of an indictment charging the prisoner with an offence under s. 7 of the Prevention of Crimes Act, 1871, the previous convictions are a necessary ingredient of the offence, and may be given in evidence before the jury in the first instance. THE KING *v.* PENFOLD C. C. R. 547

2. —— *Evidence—Action against Witness for negligently giving False Evidence—Criminal Prosecution—Conviction unreversed.*

A person, who has been convicted of a crime, and against whom the conviction stands unreversed, cannot maintain an action against a witness for negligently giving false evidence which caused him to be wrongfully so convicted. BYNOE *v.* BANK OF ENGLAND AND WILLIAMS C. A. 467

3. —— *Evidence—Prisoners jointly indicted—Evidence by one Prisoner incriminating another—Right of the latter to cross-examine—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*), (*iii*).

Where one of two prisoners, jointly indicted, gives evidence under s. 1 of the Criminal Evidence Act, 1898, and in doing so incriminates the other prisoner, the latter is entitled to cross-examine the former. THE KING *v.* HADWEN AND INGHAM - - - - C. C. R. 882

4. —— *Evidence—Statement of Affairs in Bankruptcy—Admissibility—Misappropriation by Trustee—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *ss.* 80, 85—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 27, *sub-s.* 2.

A statement of affairs prepared by a debtor in the course of his bankruptcy under s. 16 of the Bankruptcy Act, 1883, is admissible in evidence against him on a charge, under 24 & 25 Vict. c. 96, s. 80, of misappropriation of money of which he was a trustee. THE KING *v.* PIKE C. C. R. 552

5. —— *Game—Night Poaching—Previous Convictions—Person "so offending" a Third Time*

CRIMINAL LAW—*continued.*

—*Night Poaching Act*, 1828 (9 *Geo.* 4, *c.* 69), *ss.* 1, 9.

Sect. 1 of the Night Poaching Act, 1828, provides that, if any person by night enters upon any land with any gun or other instrument for the purpose of taking or destroying game, he shall for the first and second offences be liable to certain penalties on summary conviction, and "in case such person shall so offend a third time," he shall be guilty of a misdemeanour:—

Held, that on an indictment for a third offence two previous convictions under s. 1 must be alleged and proved, and that a previous conviction under s. 9 of the Act of the misdemeanour of entering upon land by night armed and to the number of three or more for the purpose of taking game was not a previous conviction within s. 1. THE KING *v.* LINES - - - C. C. R. 199

6. —— *Indictment—Wife stealing Goods of Husband when about to leave or desert him—Indictment for Larceny—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

On the trial of a charge against a wife for stealing the goods of her husband when about to leave or desert him, which is made a criminal offence by ss. 12 and 16 of the Married Women's Property Act, 1882, it is not necessary that the indictment should contain averments that the prisoner was the wife of the prosecutor, and that she took the goods in question when leaving or deserting, or about to leave or desert, her husband. THE KING *v.* JAMES AND JOHNSON C. C. R. 540

7. —— *Perverting course of Justice—Conspiracy—Publication of Articles in Newspaper affecting Character and Conduct of Persons in course of Trial.*

During the course of the trial of two persons for felony the reporter for a certain newspaper sent to the editor articles affecting the conduct and character of the persons under trial which would have been inadmissible in evidence against them. The editor published the articles, and, after the conviction and sentence of the two persons, he and the reporter were convicted on an indictment charging them with unlawfully attempting to pervert the course of justice by publishing the articles in question and with conspiring to do so:—

Held, that the conviction must be affirmed. THE KING *v.* TIBBITS AND WINDUST C. C. R. 77

CROSS-EXAMINATION—Prisoners jointly indicted—Evidence by one prisoner incriminating another—Right of the latter to cross-examine - - - 882
See CRIMINAL LAW. 3.

DAMAGES—Costs—"Action founded on tort"—Judgment for nominal damages and injunction - - - - 532
See PRACTICE. 5.

—— Liability—Intervening act of third party—Effective cause of damage - 618
See NEGLIGENCE.

—— Liquidated—Injunction—Election - 377
See PRINCIPAL AND AGENT.

DAMAGES—*continued.*

—— Stock Exchange—Client's account closed by broker—Anticipatory breach - 482
See CONTRACT.

DEBT—Assignment—Indefinite amount—Right of assignee to sue - - - 10
See ASSIGNMENT OF DEBT.

—— Attachment—Balance in hands of garnishee—Effect of notice of assignment - 527
See PRACTICE. 8.

—— Indemnity—Frauds, Statute of—Oral "promise to answer for the debt of another" - - - - 778
See GUARANTEE.

DEBTOR—Evidence—Admissibility—Debtor's books—Bankruptcy petition - 98
See BANKRUPTCY. 7.

DEBTORS ACT—Offences by bankrupt—Prosecution—Filing of report of official receiver
See BANKRUPTCY. 5. 107

DEFAMATION—Discovery—Interrogatories—Privilege - - - - 870
See PRACTICE. 7.

DEPENDANT—Wholly dependent—Workmen's Compensation Act - - - 221
See EMPLOYER AND WORKMAN. 7.

—— Workmen's Compensation Act—Funeral expenses - - - - 25
See EMPLOYER AND WORKMAN. 11.

DISCOVERY—Interrogatories—Defamation—Privilege - - - - 870
See PRACTICE. 7.

DISCRETION—Compensation to officer on abolition of office—Practice of Treasury—Discretion of council - - 317
See LOCAL GOVERNMENT. 1.

—— Costs—Leave to appeal—Official referee
See PRACTICE. 3. 643

—— Solicitor—Annual certificate—Duty of registrar - - - - - 128
See SOLICITOR.

DISMISSAL—Wrongful—Writ for service out of the jurisdiction—Breach of contract
See PRACTICE. 10. 867

DISQUALIFICATION—Franchise—"Medical assistance" - - - - 306
See PARLIAMENT. 1.

DIVIDED PARISHES—Pauper—Parish of settlement—Addition to area - - 562
See POOR LAW.

DOCK—Ship loading in—Workmen's Compensation Act - - - 204, 225
See EMPLOYER AND WORKMAN. 12, 13.

DOCK COMPANY—Continuous line of railway communication—Through rates - 568
See RAILWAY. 2.

DRAIN—Water flowing from highway—Presumption of legal origin - - 690
See HIGHWAY.

DUTY—Public Revenue.
See Cases under REVENUE.

ECCLESIASTICAL LAW — *Consistory Court — Patent of Commissary and Vicar-General—Reservation of Cause to Bishop where Party desires his Judgment—Legality of Reservation—Effect on Jurisdiction of Vicar-General—Want of Jurisdiction apparent on face of Proceedings—Prohibition.*

By letters patent appointing a Chancellor for a diocese the bishop gave him power, in the absence of the bishop from his Consistory Court, to determine certain causes, "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments from a church in the diocese, and the respondents in their reply asked that the bishop should be first consulted and his consent had, and earnestly craved his judgment. The Chancellor heard the suit, and delivered a judgment in which he held that he had jurisdiction and dealt with the merits of the case. It appeared from the judgment, though not so stated in terms, that he had not consulted the bishop or obtained his consent either to the hearing of the suit or the terms of the judgment. On appeal from a refusal to direct the issue of a writ of prohibition:—

Held, that the limitation in the patent was not illegal; that it did not relate to procedure, but had the effect of excluding the jurisdiction of the Chancellor over the excepted causes; that the absence of jurisdiction sufficiently appeared on the face of the proceedings; and that, as the objection to the hearing of the suit by the Chancellor had not been abandoned or waived, a writ of prohibition should issue.

Judgment of the Divisional Court, [1901] 2 K. B. 141, reversed. THE KING *v.* TRISTRAM C. A. 816

ELECTION—Liquidated damages—Injunction *See* PRINCIPAL AND AGENT. 377

ELECTRICAL ENERGY — Purchase of, from lessors—Stamp duty—"Lease"—"Bond or covenant" - - - - 441 *See* REVENUE. 4.

EMPLOYER AND WORKMAN—*Compensation—"Accident," Injury by—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

It was the duty of a workman employed in a factory to remove the empty yarn beams from looms. He had, in the ordinary course of his duty, removed such a beam, weighing about 100 lb., from a loom, and was in the act of lifting it on to his shoulder, when, finding that it was unevenly balanced, he gave it an extra lift up to get it on to his shoulder. The sudden strain so caused had the effect of lacerating the muscles on the right side of his back. Before this occurrence he was in good health, and had not found anything wrong with his back. Upon a claim made by him for compensation under the Workmen's Compensation Act, 1897, the county court judge found that he had been injured by an "accident":—

Held, that the decision of the county court judge was correct. BOARDMAN *v.* SCOTT & WHITWORTH - - - - - C. A. 43

2. —— *Compensation—Arbitration—Condition precedent to Jurisdiction of Arbitrator—Question as to Liability to Pay, or as to Amount or Duration of, Compensation—Agreement by which Question settled—Injury occasioned by Accident—Incapacity for Work—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 3.

Where, a workman having been incapacitated for work by an accident arising out of and in the course of his employment, his employers had, since the second week after the accident, paid to him, by way of compensation, weekly payments of the full amount mentioned in Sched. I. s. 1 (*b*), of the Workmen's Compensation Act, 1897, and promised to continue to do so during the period of his incapacity; but the workman, nevertheless, filed a request for arbitration in the county court, and the county court judge made an award for compensation in his favour:—

Held, that, under the Workmen's Compensation Act, 1897, s. 1, sub-s. 3, it was a condition precedent to the jurisdiction of the county court judge that a question should have arisen as to the liability to pay, or as to the amount or duration of, compensation under the Act, and that, no such question having arisen, the county court judge had no jurisdiction to make an award. FIELD *v.* LONGDEN & SONS - - C. A. 47

3. —— *Compensation — Building exceeding Thirty Feet in Height—Lowest Point from which to Measure—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

On an application for compensation under the Workmen's Compensation Act, 1897, it was proved that the applicant was injured in the course of his employment on a building which, whether measured from the bottom or from the top of the footings, was more than 30 feet in height. There was evidence that, at the time of the accident, the footings had been filled in, and that the building had not reached the stage at which more than the footings had been covered in. The county court judge took the lowest part of the footings as the point from which to estimate the height of the building, and made an award in favour of the applicant. On appeal:—

Held, that the height of the building to be determined was the height at the time of the accident, and, there being no evidence that at that time anything more than the footings had been covered in, the height of the building might have been taken from the top of the footings, and, as the height so measured exceeded 30 feet, the award must be upheld. MCGRATH *v.* NEILL & SONS - - - C. A. 211

4. —— *Compensation — Building exceeding Thirty Feet in Height—"Undertakers"—Sub-contractor, Workman of—Work not merely ancillary to Business of Undertakers—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

A firm of builders entered into a contract with the owner of two adjoining houses in a street, numbered respectively 16 and 17, for the demolition of No. 17 and the erection of a new building on the site of it, and for alterations and repairs to No. 16. The firm habitually entered into contracts for the demolition of buildings and the erection of new buildings on their sites. It was, however, their practice not to execute the work of demolition themselves but to sub-contract for

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that work with another person, which they accordingly did with regard to the house No. 17. The two houses respectively, and the party wall common to both, were of a height exceeding thirty feet. An accident happened to a workman employed by the sub-contractor in the demolition of No. 17 in the course of his employment, which caused his death. At the time of the accident No. 17 had been reduced to a height of about eleven feet, excepting the party wall, which was not to be pulled down, and remained standing. On a claim by the workman's widow for compensation for herself and children as dependants on the deceased under the Workmen's Compensation Act, 1897, the county court judge found that the workman was employed in the demolition of a building which at the time of the accident exceeded thirty feet in height, and that the builders were liable to make compensation to his dependants under s. 4 of the Act:—

Held, that there was evidence to support the county court judge's finding as above mentioned; that the builders were "undertakers" of the work of demolition within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2; that that work was not merely ancillary to their business; and therefore that they were liable under s. 4 of the Act. KNIGHT *v.* CUBITT & Co. **C. A. 31**

5. —— *Compensation — Building exceeding Thirty Feet in Height—"Undertakers"—Workmen in Employ of Sub-contractor—Work ancillary to Business of Undertakers—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

The respondent, a builder, entered into a contract to erect a building which was to have an iron roof. It was no part of his usual business to construct or erect such a roof, and he had no one in his employment who could do this. He accordingly entered into a sub-contract with a firm to do the work, and one of the workmen employed by that firm was killed while engaged on the work. On an application for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the erection of such a roof was no part of the ordinary business of the respondent, but that it was part of such a business as ordinarily carried on, and was therefore not ancillary to the business carried on by the respondent within the meaning of s. 4 of the Act. On appeal.

Held, that the test, whether a sub-contract is for work ancillary to the business carried on by the undertaker, is whether the work is that of the particular undertaker, and not whether it is generally undertaken by persons carrying on a similar business.

Knight v. *Cubitt & Co.*, [1902] 1 K. B. 31, distinguished. BUSH *v.* HAWES - **C. A. 216**

6. —— *Compensation—Casual Employment—Incapacity resulting from Injury—Accident on First Day of Employment—Mode of arriving at Amount of Award—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *First Schedule*, 1 (*b*).

On an application for compensation under the Workman's Compensation Act, 1897, it was proved that the applicant, a casual dock labourer, who had not been previously employed by the respondents, was engaged for a day at a certain rate of wages per hour, but subject to discharge on an hour's notice. He met with an accident in the course of that day. The county court judge took into consideration the average weekly earnings of a labourer such as the applicant, taking one week with another, by whomsoever employed, and awarded a weekly payment of half that sum. On appeal:—

Held, that this mode of arriving at the amount of compensation to be awarded was erroneous, as it was not based upon the period during which the applicant had been in the employment of the same employer as required by the schedule to the Act. BARTLETT *v.* TUTTON & SONS - - - - - **C. A. 72**

7. —— *Compensation — Dependants wholly Dependent—Earnings of Workman at Time of his Death—Money coming to Dependants on Death of Workman—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., cl.* 1 (*a*), (i.)

In the case of the death of a workman leaving dependants, the test by which to determine whether they were wholly dependent on his earnings at the time of his death, within the meaning of the Workmen's Compensation Act, 1897, is whether what the workman was earning at the time of his death was the sole source to which they could look for maintenance at that time, and the fact that money came to them on the death of the workman cannot therefore be taken into consideration. PRYCE *v.* PENRIKYBER NAVIGATION COLLIERY COMPANY - **C. A. 221**

8. —— *Compensation — Employment for less than Two Weeks—Mode of arriving at Sum to be awarded — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I. s.* 1 (*a*), (*i.*); *s.* 1 (*b*).

On an application for an award of compensation under the Workmen's Compensation Act, 1897, in the case of a workman who had met with his death from an accident occurring in the course of his employment, it was proved that the deceased had been promised work for sixty hours a week at a given rate of wages per hour, but that he was liable to be dismissed at an hour's notice. He actually worked for four days, and the accident which caused his death happened on the fourth day. The county court judge awarded the maximum compensation on the basis of an employment to work sixty hours a week at the agreed rate of wages per hour:—

Held, that it was a fair inference from the terms of the engagement that the employment was not casual, but was to continue from week to week; and that the county court judge was therefore entitled to treat the deceased as a person whose standard of wages at the time he met with the accident was sixty hours a week at the agreed rate of wages per hour; and that the award must stand.

On an application for an award of compensation under the Workmen's Compensation Act, 1897, in the case of a workman who had met with an accident in the course of his employment, it was proved that the applicant had worked from Wednesday in one week up to and including Wednesday in the next week, and

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that he then met with an accident which incapacitated him. The county court judge awarded a weekly payment calculated on the basis of an employment to work six days a week at the agreed rate of wages per day:—

Held, that the county court judge was not bound to divide the actual sum earned by the applicant by 2 so as to average the amount by reference to the two weeks in which it was earned, but th he was entitled on the evidence to arrive at ne conclusion that the average weekly earnings of the applicant, had he had the opportunity of earning wages in two or more weeks, would have been six times the amount of the agreed daily wages, and that the award must stand. AYRES *v.* BUCKERIDGE. WHEALE *v.* RHYMNEY IRON COMPANY. JONES *v.* RHYMNEY IRON COMPANY - - - - **C. A. 57**

9. —— *Compensation—Employment on Building over Thirty Feet in Height—"Scaffolding"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A workman suffered injury while engaged in the repair of the roof of a house more than 30 feet high by means of a ladder and a crawling-board, which was a contrivance ordinarily used in the repair of roofs, and consisted of a wooden plank about 18 to 20 feet long and 10 inches wide, across which were nailed transverse pieces of wood to give support to the man while working upon it; on the under side at one end was fastened a cross-piece of wood which fitted over the ridge of the roof and kept the board in position. At the time of the accident the workman was on the roof fixing the crawling-board, while the lower end of the board was being steadied by an assistant standing on the ladder.

Held, by Collins M.R. and Mathew L.J. (Stirling L.J. dissenting), that there was evidence to justify the finding of a county court judge that the crawling-board was a scaffolding within the meaning of s. 7 of the Workmen's Compensation Act, 1897. VEAZEY *v.* CHATTLE **C. A. 494**

10. —— *Compensation — Factory — Machine worked by Hand-power—Warehouse—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 93—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Premises in which machinery is set in motion and kept in motion by hand-power only are not premises wherein "mechanical power" is used within the meaning of s. 93 of the Factory and Workshop Act, 1878, and the use of such machinery does not constitute the premises a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897.

A warehouse may be a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, although it is not part of, or adjacent to, a dock, wharf, or quay, and is not contiguous to water. WILLMOTT *v.* PATON - **C. A. 237**

11. —— *Compensation — Funeral Expenses—Deceased Workman—Dependants in part dependent upon his Earnings—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I. s.* 1 (*a*), *sub-s.* (*ii.*).

The arbitrator, in assessing the amount payable as compensation under the Workmen's

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Compensation Act, 1897, Sched. I. s. 1 (*a*), sub-s. (ii.), to a person in part dependent upon the earnings of a deceased workman, is entitled to take into consideration expenses in respect of the workman's funeral. BEVAN *v.* CRAWSHAY BROTHERS (CYFARTHA), LIMITED - **C. A. 25**

12. —— *Compensation—Ship in Dock—Employment on, in, or about a Ship in a Dock—Ship Loading in Dock — Action against Employer—Failure to prove Liability of Employer—Assessment of Compensation under Workmen's Compensation Act*, 1897—*Costs of Proceedings—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 4; *s.* 7, *sub-ss.* 1, 2, *Sched. II.* (6).

A workman employed in loading or unloading a ship lying in a dock is employed on or in or about a factory within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897.

Where on the failure of an action brought, under the Employers' Liability Act, 1880, to recover damages for injury caused by an accident compensation is assessed under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, the Court before which the action is tried has power to deal with the costs, including costs of the proceedings for the assessment of compensation. CATTERMOLE *v.* ATLANTIC TRANSPORT COMPANY **C. A. 204**

13. —— *Compensation—Ship in Dock—Factory—Undertakers—"Actual Use or Occupation"—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A firm of employers contracted to do the painting and plumbing on a ship lying in a dock, and sent workmen on board to do the work. Some of the crew were in charge of the ship for the owners, but the firm were in possession of the ship so far as was necessary for the work that they had contracted to do. One of the workmen was injured by an accident in the course of his employment. On an application to recover compensation under the Workmen's Compensation Act, 1897:—

Held, that the ship was a factory within the meaning of the Act, and that the possession of the shipowners, for a purpose not inconsistent with the possession of the employers, did not prevent the latter from having the actual use or occupation of the ship within the meaning of the Factory and Workshop Act, 1895. BARTELL *v.* W. GRAY & CO. - - - **C. A. 225**

14. —— *Compensation—"Wharf," Meaning of—Structure moored at a distance from Shore—"Factory"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1.

A structure moored in a river at some distance from, and not connected with, the shore, which was used for the purpose of discharging coal from ships into barges:—

Held, to be a "wharf" within the meaning of the Factory and Workshop Act, 1895, s. 23, sub-s. 1, and therefore a "factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2. ELLIS *v.* WILLIAM CORY & SON, LIMITED - - - **C. A. 38**

EMPLOYER AND WORKMAN—*continued.*

15. —— *Machinery, Defect in Condition of—Machine no longer in Use—"Machinery or Plant connected with or used in the Business of the Employer"—Injury to Workman—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.

A machine used in the defendants' business broke down, and the foreman directed that it should be removed from the position in which it had been placed while in use. The plaintiff, who was a workman in the employment of the defendants, assisted in removing the machine, and was injured while doing so by reason of a defect in the machine which was within the knowledge of the foreman. In an action under the Employers' Liability Act, 1880:—

Held, that the fact that the machine at the time of the accident had broken down, and was no longer in use, did not necessarily shew that it had ceased to be "machinery or plant connected with or used in the business of the employer" within the meaning of s. 1, sub-s. 1, of the Act.

Judgment of the King's Bench Division, [1901] 2 K. B. 483, reversed. THOMPSON *v.* CITY GLASS BOTTLE COMPANY - - C. A. 233

16. —— "*Workman*"—*Person employed in Coal Mine by Contractor—Contract by Workman with Mine-owner to obey Regulations—Liability of Mine-owner—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58)—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.

The owners of a colliery entered into an agreement with a contractor by which the latter contracted to sink and wall a shaft in the colliery. One of the workmen employed upon the work by the contractor, and paid by him, was fatally injured by an explosion of gas in the mine. The deceased had, like all the other men employed by the contractor, signed the "record book" kept by the colliery owners, by which, in consideration of being employed in the mine, he became bound to observe the regulations and conditions laid down for the safety of the mine and for the guidance of the persons employed therein. The administrator of the deceased having brought an action against the colliery owners under the Employers' Liability Act, 1880, to recover damages for his death:—

Held, affirming the decision of a Divisional Court, [1901] 1 K. B. 756, that the signature of the conditions by the deceased did not create a contract of service between him and the colliery owners; that the deceased was not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the meaning of s. 10 of the Employers and Workmen Act, 1875: and that the Employers' Liability Act, 1880, did not therefore apply. FITZPATRICK *v.* EVANS & Co. - - - C. A. 505

—— Appeal to High Court—Order under s. 5 of Workmen's Compensation Act, 1897
See COUNTY COURT. 2. 880

—— Liability of master—Forage supplied by direction of coachman—Authority to pledge credit of master - - 745
See MASTER AND SERVANT.

ESTATE DUTY.
See Cases under REVENUE.

ESTOPPEL—*Res judicata—Justices, Summary Proceedings before—Decision that Street is a Highway—Local Government—Wakefield Corporation Act*, 1887 (50 & 51 *Vict. c. lxxi.*), *ss.* 29, 30, 31—*Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.

In proceedings taken in 1898 under ss. 29, 30, and 31 of the Wakefield Corporation Act, 1887 (which are identical with ss. 6, 7, and 8 of the Private Streets Works Act, 1892), for paving, &c., part of a certain street, the magistrates decided on an objection of the frontagers that the street was a highway repairable by the inhabitants at large. In 1900 fresh proceedings were taken under the same sections with the same object, and the same objection was taken by the frontagers:—

Held, that the matter was not res judicata, and that the previous decision was no bar to the proceedings. WAKEFIELD CORPORATION *v.* COOKE Div. Ct. 188

EVIDENCE—Bankruptcy petition—Debtor's books—Admissibility - - 98
See BANKRUPTCY. 7.

—— False Evidence, Action against witness for negligently giving—Criminal prosecution—Conviction unreversed - 467
See CRIMINAL LAW. 2.

—— Misappropriation by trustee—Statement of affairs in bankruptcy—Admissibility
See CRIMINAL LAW. 4. 552

—— Prisoners jointly indicted—Evidence by one prisoner incriminating another—Right of the latter to cross-examine - 882
See CRIMINAL LAW. 3.

EXECUTION CREDITOR—Interpleader—Indemnity—Lien passing to trustee in bankruptcy - - - - 1
See BANKRUPTCY. 3.

EXECUTOR—Public-house—Licensed person—Executor of deceased licensee - 94
See LICENSING ACTS. 1.

FACTORY—Expense of complying with requirement of sanitary authority—Landlord and tenant - - - - 761
See COUNTY COURT. 1.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

FALSE EVIDENCE—Action against witness for negligently giving—Criminal prosecution—Conviction unreversed - 467
See CRIMINAL LAW. 2.

FALSE WARRANTY—Jurisdiction of justices—Successive warranties - - 901
See ADULTERATION. 2.

—— Limit of time for taking proceedings—Sale of food and drugs - - - 661
See ADULTERATION. 3.

FILING—Report of official receiver—Offences by bankrupt—Prosecution - - 107
See BANKRUPTCY. 5.

FINANCE ACTS.
See Cases under REVENUE.

FIXTURES—Removal of — Action founded on tort — Costs — Agreement for lease of house - - - - 612
See PRACTICE. 2.

FOOD AND DRUGS—Sale of.
See Cases under ADULTERATION.

—— Sale of—Practice—Service of summons on limited company - - - 91
See COMPANY.

FORAGE—Supplied by direction of coachman—Authority to pledge credit of master
See MASTER AND SERVANT. 745

FOREIGN COMPANY — Carrying on business temporarily in England—Service of writ within the jurisdiction - - - 342
See PRACTICE. 9.

FORFEITURE—Building agreement—Forfeiture of plant by builder after bankruptcy—Protected transaction - - 555
See BANKRUPTCY. 6.

FORGED INDORSEMENT—Cheque — Draft by one branch of bank on another—Bill of exchange - - - - 242
See BANKER.

FRANCHISE.
See Cases under PARLIAMENT.

FRAUDS, STATUTE OF — Indemnity — Oral "promise to answer for the debt of another" - - - - 778
See GUARANTEE.

FUNERAL EXPENSES — Compensation — Deceased workman—Dependants in part dependent upon his earnings - 25
See EMPLOYER AND WORKMAN. 11.

GAME—Night poaching — Previous convictions —Person "so offending" a third time
See CRIMINAL LAW. 5. 199

GAMING—*House used for Betting—Receipt of money beyond the United Kingdom—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

By s. 1 of the Betting Act, 1853, it is an offence to keep a house for the purpose of money being received by or on behalf of the keeper of the house as the consideration for undertakings to pay thereafter money on events relating to horse-races or games:—

Held, that to constitute an offence under that section it is not necessary that the money should be intended to be received at the house itself, nor need the intended place of receipt be within the United Kingdom. STODDART *v.* HAWKE
Div. Ct. 353

GARNISHEE—Attachment of debt—Balance in hands of garnishee—Effect of notice of assignment - - - - 527
See PRACTICE. 8.

GENERAL AVERAGE—One owner of ship and cargo—Insurance of cargo—Liability of underwriters - - - 734
See INSURANCE, MARINE.

GUARANTEE — *Indemnity — Oral "Promise to answer for the Debt of another" — Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

The defendant, who was a director of and had a large interest as a shareholder in a company, which he had also financed, orally promised the plaintiffs, who were judgment creditors of the company, and who had delivered to the sheriff a writ of fi. fa. which they had issued upon their judgment, on which the sheriff had failed to levy because he could not effect an entry, that he (the defendant) would indorse bills for the amount of the debt:—

Held, that this promise was not a contract of indemnity, but was a "promise to answer for the debt of another" within s. 4 of the Statute of Frauds, and that, as it was not in writing, an action for the breach of it could not be maintained:

Held, also, that the case was not excepted from s. 4 by reason of the interest which the defendant had as a shareholder and otherwise in freeing the goods of the company from the execution, he having no legal interest in or charge upon the goods.

The authorities which have established exceptions from s. 4 considered.

Decision of Mathew J. reversed. HARBURG INDIA RUBBER COMB COMPANY *v.* MARTIN
C. A. 778

HIGHWAY—*Drain—Water flowing from Highway—Discharge on Land of Adjoining Owner—Absence of Defined Channel at Outlet of Drain—Claim of Right—Presumption of Legal Origin—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 67.

The highway authority of a rural district had, for a time beyond living memory, maintained a pipe running through a bank which divided the highway from the defendant's land adjoining, and had discharged, through the pipe and on to the defendant's land, water which collected on the highway. There was no defined channel on the defendant's land into which the water so discharged could flow. The defendant having stopped up the pipe, an injunction was claimed to restrain him from continuing the obstruction. On appeal from the refusal of the injunction:—

Held, that the fact that the pipe was not connected with a defined channel into which the water conveyed by it could flow did not prevent its being a drain within the meaning of s. 67 of the Highway Act, 1835; and that, in view of the length of time during which the drain had been used, a legal origin ought to be presumed for the right claimed of passing water through the drain on to the defendant's land.

Judgment of Lord Alverstone C.J., [1901] 2 K. B. 101, reversed. ATTORNEY-GENERAL ON RELATION OF BROMLEY RURAL DISTRICT COUNCIL *v.* COPELAND - - - - C. A. 690

—— Res judicata—Decision that street is a highway - - - - - 188
See ESTOPPEL.

—— Within two jurisdictions — New street — Sewer—Recovery of expenses - 336
See LONDON. 2.

HIRING—Bill of sale—Mortgage or hire-purchase agreement - - - - 137
See BILL OF SALE. 1.

HUSBAND AND WIFE—Larceny, Indictment for—Wife—Stealing goods of husband when about to leave or desert him 540
See CRIMINAL LAW. 6.

INFERIOR COURT—*Court of Record of Civil Jurisdiction—Appeal to the King's Bench Division—Right of Appeal—Procedure—Judicature Act*, 1884 (47 & 48 *Vict. c.* 61), *s.* 23—*Rules of Supreme Court, Order* LIX., *rr.* 10–17.

An appeal from any inferior Court of Record of civil jurisdiction, when there is no statute regulating the appeal, can now be brought to the King's Bench Division under Order LIX., rr. 10–17. DARLOW *v.* SHUTTLEWORTH
Div. Ct. 721

INDEMNITY—Frauds, Statute of—Verbal "promise to answer for the debt of another" 778
See GUARANTEE.

—— Interpleader — Execution creditor — Lien passing to trustee in bankruptcy 1
See BANKRUPTCY. 3.

INDICTMENT—Larceny—Wife stealing goods of husband when about to leave or desert him - - - - - - 540
See CRIMINAL LAW. 6.

INFORMATION—Dismissal of—Case stated on application of informant—"Either party to the proceeding" - - - 857
See JUSTICES. 1.

INN—Licensed person — Executor of deceased licensee - - - - - 94
See LICENSING ACTS. 1.

—— Public-house—Right of licence-holders to request person to leave licensed premises 296
See LICENSING ACTS. 3.

INNKEEPER—*Obligation to lodge Traveller—Shelter and Accommodation for the Night—Demand of Traveller to pass Night in Public Room of Inn when Bedrooms full.*

If all the bedrooms of an inn be full, the innkeeper is under no duty at common law to provide a traveller with shelter and accommodation for the night, although the coffee-room be unoccupied and the traveller demands to be allowed to pass the night there. BROWNE *v.* BRANDT - - - - - Div. Ct. 696

INJUNCTION—Costs—"Action founded on tort"—Judgment for nominal damages and injunction - - - - - 532
See PRACTICE. 5.

—— Liquidated damages—Election - 377
See PRINCIPAL AND AGENT.

INSURANCE, ACCIDENT—*Accident—Principal and Agent—Misstatements in Proposal made by Agent of Insurers without Knowledge of Insured—Authority of Agent.*

A policy of insurance against accidental injury was effected with an insurance company through their local agent. The proposal form was filled up by the agent, many of the answers filled in by him being false in material respects; the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal form without reading it. The proposal contained a declaration in which the applicant agreed that the statements in the proposal should form the basis of the policy, and the policy contained a proviso that it was granted on the express condition of the truthfulness of the statements in the proposal. Shortly after payment of the premium the insured was accidentally injured:—

Held, first, that it was the duty of the applicant to read the answers in the proposal before signing it, and that he must be taken to have read and adopted them; and, secondly, that in filling in the false answers in the proposal the agent was acting, not as the agent of the insurance company, but as the agent of the applicant; and that therefore the policy was void. BIGGAR *v.* ROCK LIFE ASSURANCE COMPANY
Wright J. 516

INSURANCE, MARINE—*General Average—One Owner of Ship and Cargo—Insurance of Cargo—Liability of Underwriters.*

A loss caused by the cutting away of a ship's mast for the safety of the whole adventure is a general average loss to which the underwriters of a policy of insurance on cargo against perils of the sea are bound to contribute, although the assured is owner of both ship and cargo, and, therefore, as between those interests, there can be no contribution to general average.

Decision of Mathew J., [1901] 1 K. B. 147, affirmed.

Judgment of Gorell Barnes J. in *The Brigella*, [1893] P. 189, disapproved. MONTGOMERY & Co. *v.* INDEMNITY MUTUAL MARINE INSURANCE COMPANY - - - - - C. A. 734

INTERLOCUTORY ORDER — Compromise of action—Agreement to refer—Authority exceeded by counsel - - 838
See PRACTICE. 6.

INTERPLEADER—Execution creditor—Indemnity—Lien passing to trustee in bankruptcy - - - - 1
See BANKRUPTCY. 3.

INTERROGATORIES — Discovery — Defamation—Privilege - - - - 870
See PRACTICE. 7.

JUDGMENT—Action on—Part payment—Real property limitation - - 676
See LIMITATIONS, STATUTE OF. 1.

JUDICATURE ACT—Costs, Discretion as to—Leave to appeal—Official referee 643
See PRACTICE. 3.

—— Debt—Indefinite amount—Right of assignee to sue - - - - - 1
See ASSIGNMENT OF DEBT.

—— "Practice and procedure"—Regulation of railways—Appeal from order of judge at chambers - - - 813
See PRACTICE. 1.

JURISDICTION—Dismissal of information—Case stated on application of informant—"Either party to the proceeding" 857
See JUSTICES. 1.

—— Highway within two jurisdictions—New street—Sewer—Recovery of expenses
See LONDON. 2. 336

—— Justices—Compensation—Condition precedent—Tenant—Title - - 874
See LANDS CLAUSES ACTS.

—— Justices—False warranty—Place where article purchased for analysis - 901
See ADULTERATION. 2.

—— Landlord and tenant—Factory—Expense of complying with requirement of sanitary authority - - - - 761
See COUNTY COURT. 1.

—— Prohibition—Want of jurisdiction apparent on face of proceedings - - 816
See ECCLESIASTICAL LAW.

—— Recognizances to be of good behaviour—Public meetings—Use of insulting language - - - - 167
See JUSTICES. 2.

—— Service of writ within the—Foreign company carrying on business temporarily in England - - - - 342
See PRACTICE. 9.

—— Summary—Street—Paving—"Back roads"—"Cross roads" - - - 794
See LOCAL GOVERNMENT. 3.

—— Summary conviction on charge of assault—Question as to title to an interest in land - - - - 637
See JUSTICES. 3.

—— Workmen's Compensation Act—Condition precedent to jurisdiction of arbitrator
See EMPLOYER AND WORKMAN. 2. 47

—— Writ for service out of the jurisdiction—Breach of contract - - - 867
See PRACTICE. 10.

JUSTICES—*Dismissal of Information—Case stated on Application of Informant—"Either Party to the Proceeding"—Summary Jurisdiction Act*, 1857 (20 & 21 *Vict. c.* 43), *s.* 2—"*Any Person aggrieved*"—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *ss.* 49, 50—*Agent of Mine—Liability for Contravention of General Rule by Manager.*

By the Summary Jurisdiction Act, 1857, s. 2, after the hearing and determination by justices of any information or complaint "either party to the proceeding" may apply to the justices to state a case; and by the Summary Jurisdiction Act, 1879, s. 33, "any person aggrieved" who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction may apply to the Court to state a special case, and, by sub-s. 2, the Act of 1857 shall, so far as it is applicable, apply to a case stated under this section.

A special case, expressed to have been stated under the later Act only, was stated on the application of an informant, the information having been dismissed. An objection was taken that the appeal could not be heard, on the ground that the informant was not a person aggrieved within s. 33:—

Held, that, having regard to sub-s. 2 of s. 33, the provisions of the two Acts as to stating cases must be read together, and that, the informant being a party to the proceeding, the appeal could be heard.

Quære, whether a prosecutor after an acquittal is a person aggrieved so as to be entitled to apply to the High Court under s. 33 for an order requiring a case to be stated.

The Coal Mines Regulation Act, 1887, after providing by s. 49 general rules to be observed in mines, enacts by s. 50 that, in the event of any contravention of or non-compliance with the rules in the case of any mine to which the Act applies by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the rules as regulations for the working of the mine, to prevent such contravention or non-compliance.

An information was preferred under s. 49 against the agent of a coal mine, in which one of the general rules relating to the ventilation of the mine had not been complied with. The defendant had appointed a duly qualified manager and under-manager, and the non-compliance with the rules, which affected only one heading of the mine and was of a temporary character, was due to their negligence. There was no evidence of personal negligence by the defendant, and the defendant was not called as a witness. The justices found that the defendant had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager, whose duty it was to carry out the rules, and that the violation of the rules was in no way caused by the defendant omitting to enforce the rules, and they dismissed the information:—

Held, that there was evidence from which the justices might properly come to that conclusion.
STOKES *v.* MITCHESON - - **Div. Ct. 857**

2. —— *Jurisdiction—Recognizances to be of Good Behaviour—Public Meetings—Use of Insulting Language—Apprehended Breaches of the Peace.*

The appellant, a Protestant lecturer, had held meetings in public places in the town of Liverpool, causing large crowds to assemble and obstruct the thoroughfares. In addressing those meetings, he used gestures and language which were highly insulting to the religion of the Roman Catholic inhabitants, of whom there is a large body in Liverpool. The natural consequence of his words and conduct on those occasions was to cause, and his words and conduct had in fact caused, breaches of the peace to be committed by his opponents and supporters, and he threatened and intended to hold similar meetings in the town, and to act and speak in a similar way, in the future. At one of the meetings he told his supporters that he had been informed that the Catholics were going to bring sticks; and on some of his supporters saying that they would bring sticks too, he said that he looked to them for protection. A local Act in force in

JUSTICES—*continued.*

Liverpool prohibits, under a penalty, the use of threatening, abusive, and insulting words and behaviour in the streets whereby a breach of the peace may be occasioned :—

Held, that, on proof of those facts before the Liverpool stipendiary magistrate, he had jurisdiction to bind over the appellant in recognizances to be of good behaviour.

Semble, justices have jurisdiction to bind over to be of good behaviour a person who, in addressing meetings in public places, although he does not directly incite to the commission of breaches of the peace, uses language the natural consequence of which is that breaches of the peace will be committed by others, and who intends to hold similar meetings, and use similar language, in the future. WISE *v.* DUNNING - **Div. Ct. 167**

3. —— *Jurisdiction—Summary Conviction on Charge of Assault—Question as to Title to an Interest in Land—Commoner—User in excess of Right of Common—Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 46.

In the proviso to s. 46 of the Offences against the Person Act, 1861, which enacts that nothing therein contained shall authorize any justice to hear and determine any case of assault in which "any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom," the words "title to" govern, not only the words "lands, &c.," but also the words "any interest therein or accruing therefrom."

An assault was committed by one commoner upon another commoner in the course of a dispute as to whether the latter was or was not at the time of the assault in the act of using the common land in a manner in excess of the right of common. The latter summoned the former for assault, and he was convicted :—

Held, that there was no question raised as to the title to any lands, or as to the title to any interest in land, and that the jurisdiction of the justices to hear and determine the case of assault was not ousted. THE KING *v.* FRENCH - **Div. Ct. 637**

—— Betting, House used for—Receipt of money beyond the United Kingdom - **353**
See GAMING.

—— Bread—Sale otherwise than by weight **670**
See BREAD.

—— Compensation — Condition precedent — Tenant—Title - - - **874**
See LANDS CLAUSES ACTS.

—— Evidence by one prisoner incriminating another—Right of the latter to cross-examine - - - - **882**
See CRIMINAL LAW. 3.

—— Game—Night poaching—Previous convictions—Persons "so offending" a third time - - - - - **199**
See CRIMINAL LAW. 5.

—— Highway within two jurisdictions—New street—Sewer—Recovery of expenses
See LONDON. 2. **336**

—— Indictment for larceny—Wife stealing goods of husband when about to leave or desert him - - - - - **540**
See CRIMINAL LAW. 6.

JUSTICES—*continued.*

—— Misappropriation by trustee — Evidence—Statement of affairs in bankruptcy—Admissibility - - - **552**
See CRIMINAL LAW. 4.

—— Offences—Erection of premises in advance of building line—Liability of new owner
See LOCAL GOVERNMENT. 2. **646**

—— Offences—Selling by retail without licence —Club—Sale to agent of member **666**
See LICENSING ACTS. 2.

—— Pauper—Parish of settlement—Addition to area - - - - - **562**
See POOR LAW.

—— Poor-rate—Appeal—Condition precedent
See RATES. **180**

—— Proof of previous convictions—Prevention of crimes - - - - **547**
See CRIMINAL LAW. 1.

—— Public-house—Right of licence-holders to request person to leave licensed premises
See LICENSING ACTS. 3. **296**

—— Rates—Right of appeal to quarter sessions without objection before assessment committee - - - - **750**
See LONDON. 3.

—— Sale of food and drugs.
See Cases under ADULTERATION.

—— Shop—Temporary newspaper stall at railway station—Notice of hours of employment of young persons - - **286**
See SHOP.

—— Street is a highway, Decision that—Res judicata—Summary proceedings before justices - - - - **188**
See ESTOPPEL.

—— Tramcars, Use of offensive language in—By-law—Validity - - - **160**
See TRAMWAY.

—— Vaccination—Power of vaccination officer to take proceedings without authority **768**
See VACCINATION.

—— Water—Supply—"Domestic purposes"—Boarding-house keeper - - **310**
See WATER.

LABEL—On wrapper—Butter blended with milk —Notice in shop - - - **889**
See ADULTERATION. 1.

LAND TAX—Redemption—Annual sum payable by way of interest—Charge on premises
See LIMITATIONS, STATUTE OF. 2. **682**

LANDLORD AND TENANT—*Lease—Covenant by Lessee to pay and discharge "Impositions charged or imposed in respect of the Premises"—Order by Sanitary Authority on Lessor to do Structural Works.*

A lease for years contained a covenant by the lessee to "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof

LANDLORD AND TENANT—*continued.*

on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no repairing covenant in the lease. Notice was given to the lessor by the sanitary authority of the district under the Public Health (London) Act, 1891, to abate a nuisance caused by a foul and offensive privy on the premises, by removing the privy and constructing a water-closet in accordance with the by-laws of the London County Council. The lessor thereupon did the work required by the notice, and subsequently sued the lessee to recover the expense incurred by him in so doing:—

Held (reversing the decision of a Divisional Court, [1901] 2 K. B. 151), that this expense was covered by the words "impositions charged or imposed upon or in respect of the said premises on the landlord tenant or occupier of the same" in the covenant, and therefore that the action was maintainable. FOULGER *v.* ARDING
C. A. 700

2. —— *Lease—Renewal "at Costs of Lessee"—Costs of Reference and Award as to Amount of Fine payable on Renewal.*

By a covenant for renewal in a lease for years the lessor covenanted at any time during the term, upon the request and "at the costs of the lessee," to renew the lease for a further term on payment of a fine calculated (in part) upon the full improved annual value of the premises at the time of renewal, such value to be determined by the landlord's surveyor or, at the option of the lessee, by the award of two referees or their umpire. The lessee having required a renewal of the lease, and the parties being unable to agree as to the amount of the fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, and the umpire made an award:—

Held, that the costs of the renewal which were to be paid by the lessee were the ordinary conveyancing costs only, such as the costs of drawing, settling, and completing the new lease, and that they did not include the costs of the reference and award, which were in the discretion of the umpire. LORD MOSTYN *v.* FITZSIMMONS
Wright J. 512

3. —— *Notice to Quit—Validity of Notice.*

An agreement of tenancy provided that the tenancy should commence on May 1, 1895, and that the rent should be payable quarterly on May 1, August 1, November 1, and February 1, "subject to three months' notice on either side at any time to terminate this agreement." The lessor on January 24, 1901, gave the tenant three months' notice to quit on April 25:—

Held, that the notice to quit was good. SOAMES *v.* NICHOLSON - - Div. Ct. 157

—— Compensation — Condition precedent — Tenant—Title - - - 874
See LANDS CLAUSES ACTS.

—— Costs—Action founded on tort—Agreement for lease of house—Removal of fixtures
See PRACTICE. 2. 612

LANDLORD AND TENANT—*continued.*

—— Factory—Expense of complying with requirement of sanitary authority—Jurisdiction - - - - - 761
See COUNTY COURT. 1.

—— Lease—Rent—Liability of assignee for rent due before adjudication of bankruptcy
See BANKRUPTCY. 4. 595

LANDS CLAUSES ACTS—*Tenant from Year to Year—Determination of Amount of Compensation by Justices—Jurisdiction to inquire into Title—"Required to give up Possession"—Condition Precedent to Right to Compensation—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 121.

Where an application is made to justices under s. 121 of the Lands Clauses Consolidation Act, 1845, to determine the amount of compensation to be paid to a person claiming an interest as a tenant for a year, or from year to year, in land compulsorily taken, the justices have no jurisdiction to inquire into the title of the claimant to his alleged interest; but in determining the amount of compensation the justices have jurisdiction, and are bound, to inquire whether the claimant has been required to give up possession of the land before the expiration of his term or interest, that being a condition precedent to the right to compensation under s. 121. GREAT NORTHERN AND CITY RAILWAY COMPANY *v.* TILLETT - - - - Div. Ct. 874

LARCENY—Evidence—Statement of affairs in bankruptcy—Admissibility—Misappropriation by trustee - - - 552
See CRIMINAL LAW. 4.

—— Indictment—Wife stealing goods of husband when about to leave or desert him 540
See CRIMINAL LAW. 6.

—— Proof of previous convictions—Prevention of crimes - - - - 547
See CRIMINAL LAW. 1.

LEASE.
See under LANDLORD AND TENANT.

—— Stamp duty—"Bond or covenant"—Covenant relating to the matter of the lease
See REVENUE. 4. 441

LETTERS PATENT—Commissary and Vicar-General—Legality of reservation 816
See ECCLESIASTICAL LAW.

LICENSING ACTS — *Licence — Public-house — Licensed Person—Executor of deceased Licensee—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 17.

The executor of a deceased licensed person who continues to carry on the business under the provisions of s. 3 of the Licensing Act, 1872, until the next special sessions is himself a licensed person within the meaning of the Act. M'DONALD *v.* HUGHES - - Div. Ct. 94

2. —— *Offences — Selling by Retail without Licence—Club—Sale to Agent of Member—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

Where intoxicating liquor is sold by a servant of a bonâ fide working-men's club, not licensed for the sale of intoxicating liquors, to the duly authorized agent of a member for consumption by the member off the club premises, no offence is committed against s. 3 of the Licensing Act, 1872,

LICENSING ACTS—*continued.*
and the seller cannot be convicted for selling intoxicating liquors by retail without a licence. DAVIES *v.* BURNETT - - - **Div. Ct. 666**

3. —— *Public-house—Right of Licence-holders to request Person to leave Licensed Premises—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 18.
The occupier and licensee of licensed premises (not being an inn) has a right to request any person to leave whom he does not wish to remain upon his premises; his right is not limited to the case of persons who are drunken, violent, quarrelsome, or disorderly within the meaning of s. 18 of the Licensing Act, 1872. SEALEY *v.* TANDY - - - - **Div. Ct. 296**

LIEN—Building owner—Forfeiture of plant by builder after bankruptcy — Protected transaction - - - - **555**
See BANKRUPTCY. 6.

—— Interpleader — Execution creditor — Indemnity—Lien passing to trustee in bankruptcy - - - - **1**
See BANKRUPTCY. 3.

LIGHT—*Ancient Lights—Prescription—Light—Extraordinary Purposes—Ordinary Purposes—Purposes requiring Special Quantity of Light—Measure of Right.*
In considering the question of the right to relief for interference with ancient lights, there is no rule of law that the owner or tenant of the house is entitled only to so much light as may come up to some imaginary standard or measure as to what the house may ordinarily require for purposes of habitation or business. The question is essentially one of comparison—whether by reason of the deprivation of light the house is substantially less comfortable than it was before, having regard to the ordinary uses by way of habitation or business to which the house has been put or may reasonably be supposed to be capable of being put.
Certain trade premises contained ancient lights to which the flow of light was full and uninterrupted. During the latter part only of the statutory period of twenty years before action, and at the time the action was brought, the premises were used by the plaintiffs for a trade requiring an exceptional quantity and quality of light. The defendant erected a building which substantially interfered with the light coming to the plaintiffs' windows, and so darkened the premises as to leave an amount of light sufficient only for purposes of ordinary habitation or business, and materially insufficient for the special requirements of the plaintiffs' present trade:—
Held, reversing Wright J., [1900] 2 Q. B. 722, that, as the plaintiffs' ancient lights had been substantially interfered with by the defendant's building, and the user of the plaintiffs' premises for the purpose of a special business requiring much light was not unreasonable, the plaintiffs were entitled to damages for the interference.
The law stated by the Court of Appeal in *Kelk* v. *Pearson*, (1871) L. R. 6 Ch. 809, as to the right to relief for substantial interference with ancient lights, approved of and followed.
Lanfranchi v. *Mackenzie*, (1867) L. R. 4 Eq. 421, and *Dickinson* v. *Harbottle*, (1873) 28 L. T. (N.S.) 186, overruled. WARREN *v.* BROWN **C. A. 15**

LIGHT—*continued.*

LIMITATIONS, STATUTE OF—*Action on Judgment—Part Payment—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.
In 1884 the plaintiff recovered judgment against the defendant in England for 15,067*l.* 9*s.* 11*d.*; in 1886 he brought an action upon the judgment in the Courts of the South African Republic, where the defendant was domiciled. The foreign Court refused to enforce the judgment in full, but gave judgment for the plaintiff for the sum (including interest) of 9635*l.* 4*s.* 6*d.* Sequestration proceedings were then taken against the defendant in South Africa, and eventually the 9635*l.* 4*s.* 6*d.* was paid to the plaintiff by the curators under the defendant's sequestration and insolvency, and the defendant was released from all debts claimable against his estate. In 1900 the plaintiff brought an action in England against the defendant to recover the balance remaining due under the original judgment and interest thereon:—
Held, that, the action not having been brought within the period of twelve years prescribed by s. 8 of the Real Property Limitation Act, 1874, the plaintiff's right to recover was barred by that section, and that the part payment of the 9635*l.* 4*s.* 6*d.* did not operate to take the case out of the statute, it not having been made under circumstances from which an acknowledgment of liability and a promise to pay the balance could be inferred:
Held, further, that the plaintiff had elected to take the foreign judgment in discharge of his whole cause of action, and could not afterwards sue for the residue of the original judgment debt in England. TAYLOR *v.* HOLLARD - **Jelf J. 676**

2. —— *Land Tax—Redemption—Annual Sum payable by way of Interest—Charge on Premises—Land Tax Redemption Act*, 1802 (42 *Geo.* 3, *c.* 116), *ss.* 123, 125—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 8.
The lessee of premises redeemed the land tax charged thereon under the Land Tax Redemption Act, 1802, which, by s. 123, provides that, where any person, having any estate (other than an estate of inheritance) in any lands, tenements, or hereditaments, redeems the land tax charged thereon, such lands, tenements, or hereditaments shall be chargeable for his benefit with the amount of the moneys paid as the consideration for the redemption of such land tax, and with the payment of a yearly sum of money by way of interest thereon, equal in amount to the land tax redeemed. In 1879 the lessee assigned to the plaintiff the benefit of the contract for redemption of the land tax. No yearly sum having been paid by way of interest on the money paid for the redemption of the land tax since 1879, the plaintiff sued the defendant, in whom the lease of the premises had become vested in 1885, to recover 9*l.* as a yearly payment due January 1, 1900, under s. 123 of the before-mentioned Act, by way of interest on the money paid for redemption of the land tax:—
Held, that the case came either within s. 1 of

LIMITATIONS, STATUTE OF—*continued.*
the Real Property Limitation Act, 1874, or within s. 8 of that Act, and therefore the plaintiff's claim was barred.

Judgment of a Divisional Court, [1901] 2 K. B. 7, affirmed. SKENE *v.* COOK - **C. A. 682**

LIQUIDATED DAMAGES—Injunction—Election *See* PRINCIPAL AND AGENT. **377**

LOCAL GOVERNMENT—*Metropolitan Borough —Compensation to Officer on Abolition of Office— Practice of Treasury — Discretion of Council— London Government Act*, 1899 (62 *&* 63 *Vict. c.* 14), *s.* 30—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 81—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 120.

By s. 120 of the Local Government Act, 1888, which is incorporated by reference in the London Government Act, 1899, and which regulates the amount of compensation to be paid to an officer who suffers loss by the abolition of his office, it is provided that regard shall be had to the nature of his office, the duration of his service, &c., "and to all the other circumstances of the case, and the compensation shall not exceed the amount which under the Acts and Rules relating to Her Majesty's Civil Service is paid to a person on abolition of office," and the section goes on to give the person aggrieved an appeal to the Treasury.

The council of a metropolitan borough having resolved to abolish the office of vestry clerk to a local authority which had been transferred to them, considered that they were bound by an ascertained practice of the Treasury to make a deduction of one-fourth of the amount of compensation where the officer had not been required to devote his whole time to the duties of his office:—

Held, that a mandamus would lie to compel them to take the facts of the case into consideration, and to exercise a discretion in the matter. THE KING *v.* STEPNEY CORPORATION **Div. Ct. 317**

2. —— *Offences — Erection of Premises in advance of Building Line—Change of Ownership —Continuance in same State after Written Notice — Liability of New Owner — Public Health (Buildings in Streets) Act*, 1888 (51 *&* 52 *Vict. c.* 52), *s.* 3.

By the Public Health (Buildings in Streets) Act, 1888, s. 3, it is not lawful without the consent of the urban authority to erect a house in any street beyond the front main wall of the house on either side thereof; and "any person offending against this enactment shall be liable to a penalty not exceeding 40*s.* for every day during which the offence is continued after written notice in this behalf from the urban authority."

A house was erected by a builder in contravention of s. 3, and subsequently passed into the ownership of the respondent, who maintained the house in the same state after written notice from the urban authority:—

Held, that the respondent had not committed an offence under s. 3 of the Act. BLACKPOOL CORPORATION *v.* JOHNSON - - **Div. Ct. 646**

3. —— *Street—Paving—Making up — Landowner—Frontager—Notice to Pave and Make up*

LOCAL GOVERNMENT—*continued.*
—Paving Expenses, Recovery of—Summary Jurisdiction — Action in High Court — Option of Jurisdiction—Six Months' Limit for Proceedings —Local Act—"Back Roads" — "Cross Roads" —Mistake in Notice—Validity of Notice—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 140, 145—*Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Blackburn Improvement Act*, 1882 (45 *&* 46 *Vict. c. ccxliii.*).

Sect. 232 of the Blackburn Improvement Act, 1882, enacted that expenses incurred by the corporation of Blackburn in paving any street under the provisions of the Act should be recoverable by them either by summary proceeding before two justices—which proceeding is, by s. 11 of the Summary Jurisdiction Act, 1848, required to be commenced within six months from the time of the cause of action arising—"or, if the corporation think fit, in the superior Courts or any Court of competent jurisdiction."

Certain frontagers having failed to comply with a notice under the local Act to pave a street in the borough, the corporation, acting under their powers, themselves paved the street, and in July, 1898, served the frontagers with notice of apportionment of the expenses and demand for payment. The frontagers made default in payment, whereupon the corporation, in February, 1900, commenced an action against them in the Queen's Bench Division for the recovery of the apportioned expenses. The defendants resisted the plaintiffs' claim on the ground that, upon the construction of s. 232 of the local Act, the claim was too late, inasmuch as the six months' limitation under s. 11 of the Summary Jurisdiction Act, 1848, applied to proceedings whether under the summary jurisdiction or otherwise:—

Held, that under s. 232 the corporation had an option to proceed for the recovery of paving expenses either by complaint before justices under the summary jurisdiction or, alternatively, by action in the superior Courts or in any Court of competent jurisdiction; that the six months' limitation applied only to a proceeding under the summary jurisdiction, and not to any of the alternative proceedings, and that the action was therefore not out of time.

West Ham Local Board v. *Maddams*, (1876) 40 J. P. 470, and *Tottenham Local Board* v. *Rowell*, (1876) 1 Ex. D. 514, distinguished.

Vestry of Hammersmith v. *Lowenfeld*, [1896] 2 Q. B. 278, overruled.

Decision of Mathew J. reversed.

The local Act contained separate and distinctive definitions of a "back road" and a "cross road." The corporation served a paving notice under the Act upon frontagers in a back road and two cross roads by reference to a plan deposited for inspection at the office of the borough surveyor, but the notice by mistake described all the three roads upon which the work was to be done as "back roads" only:—

Held, affirming Mathew J. on this point, that the mistake in the description could not have misled the frantagers, and that, therefore, the notice was a good foundation for an action brought by the corporation under the Act for

LOCAL GOVERNMENT—*continued.*
expenses incurred by them in executing the work themselves in the cross roads as well as the back road. BLACKBURN CORPORATION *v.* SANDERSON - - - - **C. A. 794**

4. —— *Urban District Council—Retainer of Solicitors by Resolutions not under Seal—Subsequent affixing of Seal after Work partly done under Retainer—Costs of Local Inquiry—Costs of Parliamentary Opposition to Confirmation of Provisional Order—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 297, 298—*Municipal Corporations (Borough Funds) Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 8—*Local Government Boards Provisional Orders Confirmation (No.* 14) *Act*, 1900 (63 & 64 *Vict. c. clxxxiii.*).

An urban district council, by resolutions not under seal, retained the plaintiffs, a firm of solicitors, to represent them at a local inquiry as to the proposed inclusion of their district in adjoining areas, and to oppose in Parliament a bill for the confirmation of a provisional order made by the Local Government Board for carrying the proposed scheme into effect. Subsequently, after the work had been done by the plaintiffs under the retainers, the seal of the council was affixed to the resolutions by which the plaintiffs were retained as solicitors, and sealed copies of these resolutions were sent to the plaintiffs; the retainer was not accepted in writing by the plaintiffs. The confirming Act having passed, the plaintiffs delivered their bill of costs to the urban district council and afterwards, upon the dissolution of the council, to the defendants, between whom the district had been divided:—

Held, that the confirmation under seal of the original retainers was binding on the district council without a new consideration, and that the requirements of s. 174 of the Public Health Act, 1875, and of the common law had been complied with; that the costs were costs properly incurred under ss. 297 and 298 of the Public Health Act, 1875, as being the reasonable costs of a local authority in respect of a provisional order made in pursuance of the Act and of the inquiry preliminary thereto; that they were not subject to the requirements of the Municipal Corporations (Borough Funds) Act, 1872, but came within the exception contained in s. 8 of that Act; and that therefore the urban district council were before their dissolution under a liability, subject to taxation and to the sanction of the Local Government Board, to pay the plaintiffs' bill of costs:

Held, further, that upon the true construction of art. 18 of the Torquay Order, 1900, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900, the liability of the urban district council had been transferred to the defendants. BROOKS, JENKINS & CO. *v.* TORQUAY CORPORATION AND NEWTON ABBOT RURAL DISTRICT COUNCIL **Walton J. 601**

—— Res judicata—Decision that street is a highway - - - - - **188**
See ESTOPPEL.

LOCAL GOVERNMENT BOARD—General Order of October 18, 1898, arts. 26, 27 - **769**
See VACCINATION.

LONDON—*Building—Wooden Structure—Transfer of Powers from County Council — London Building Act*, 1894 (57 & 58 *Vict. c. cxxiii.*), *s.* 84 —*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 5; *Sched. II., Part I.*

A structure made wholly of wood, except so far as nails are used in its construction, and erected for the temporary purpose of enabling persons to view a public procession or spectacle, is a wooden structure within the meaning of s. 84 of the London Building Act, 1894, and the power to license the setting up of such a structure, and to take proceedings for default in obtaining or observing the conditions of a licence, is transferred by the London Government Act, 1899, from the London County Council to each of the borough councils established by that Act as respects their borough. COUNCIL OF THE CITY OF WESTMINSTER *v.* LONDON COUNTY COUNCIL **Div. Ct. 326**

2. —— *Highway within Two Jurisdictions—New Street — Sewer — Recovery of Expenses — Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 112.

The boundary between two parishes, one of which was in the county of London and the other in Middlesex, ran along the middle of an old highway 2993 feet in length. At the time when the Metropolis Management Act, 1855, came into operation, buildings had been erected on the Middlesex side of the highway, along nearly the whole of its length, but on the London side there were only seven or eight buildings situated at various points. A number of buildings having recently been erected along the London side of the highway, the vestry of the parish to which that portion of the highway belonged laid down a sewer under it for the purpose of draining those buildings, and apportioned the expenses of making the sewer among the frontagers upon that side of the highway on the ground that it was a new street. One of the frontagers having refused to pay the amount apportioned upon him, application was made to justices by the vestry for an order for payment by him of that amount. The justices found as a fact that, at the time when the Metropolis Management Act, 1855, came into operation, the highway, as a whole, had already become a street; and, that being so, they decided that they could not deal with the London side of the highway by itself for the purpose of determining whether it was a new street, and therefore they dismissed the application:—

Held, affirming the judgment of a Divisional Court, [1901] 1 K. B. 264, that, upon the finding of the justices as above mentioned, their decision was right. CLERKENWELL VESTRY *v.* EDMONDSON & SON - - - - - **C. A. 336**

3. —— *Rates—Partial Exemption of Land covered with Water in Woolwich—London Government Act*, 1899—*Continuation of Exemption—Land covered with Water not separately assessed in Valuation List—Rate made upon Full Value of the Whole Hereditament—Right of Appeal to Quarter Sessions without Objection before Assessment Committee—London Government Act*, 1899

LONDON—*continued.*
(62 & 63 *Vict. c.* 14), *ss.* 10, 19—17 *Geo.* 2, *c.* 38, *s.* 4.

Before 1900 general district rates were made in Woolwich under the Public Health Act, 1875, under s. 211 of which the owners and occupiers of land covered with water were liable to be assessed to certain rates upon one-fourth part only of the annual value thereof. The London Government Act, 1899, by s. 10, provided that a scheme under the Act should provide for protecting the interests of owners and occupiers of any hereditament exempt for any rate or liable to be assessed thereto at a less amount than other hereditaments; and, by s. 19, that a scheme under the Act should provide for placing Woolwich under the general law applicable to metropolitan boroughs and for the repeal of the application thereto of the Public Health Acts; and the schemes made under the Act provided accordingly. The owners of land in Woolwich, part of which was covered with water, were assessed in the valuation list in one amount for the whole hereditament, and in 1901 were rated in respect thereof to the general rate upon the full annual value and to the full amount of the rate. The owners appealed to quarter sessions against the rate:—

Held, that the partial exemption of land covered with water in Woolwich was preserved, and that the owners were liable to be assessed in respect thereof upon one-fourth part only of the annual value:

Held, also, that the owners were entitled to appeal to quarter sessions against the rate without first objecting to the valuation list before the assessment committee. LONDON AND INDIA DOCKS COMPANY *v.* BOROUGH OF WOOLWICH **Div. Ct. 750**

—— Compensation to officer on abolition of office—Practice of Treasury—Discretion of council - - - - **317**
See LOCAL GOVERNMENT. 1.

LUNACY—Franchise—Disqualification—"Medical assistance" - - - **306**
See PARLIAMENT. 1.

MACHINERY—Workmen's Compensation Act **233, 237**
See EMPLOYER AND WORKMAN. 10, 15.

MALICE — Slander — Interrogatories — Defamation—Privilege - - - **870**
See PRACTICE. 7.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MASTER AND SERVANT.
See Cases under EMPLOYER AND WORKMAN.

1. —— *Liability of Master—Forage supplied by Direction of Coachman — Authority to pledge Credit of Master.*

The relation of master and coachman does not clothe the latter with ostensible authority to pledge his master's credit for forage supplied for his horses.

Precious v. *Abel*, (1795) 1 Esp. 350, and *Rimell* v. *Sampayo*, (1824) 1 C. & P. 254, commented on. WRIGHT *v.* GLYN - - - **C. A. 745**

MASTER AND SERVANT—*continued.*

"**MEDICAL ASSISTANCE**" — Maintenance of voter's wife in pauper lunatic asylum—Disqualification - - - **306**
See PARLIAMENT. 1.

METROPOLIS.
See under LONDON.

MINE—Agent of—Liability for contravention of general rule by manager - - **857**
See JUSTICES. 1.

—— "Workman"—Contract by workman with mine-owner to obey regulations - **505**
See EMPLOYER AND WORKMAN. 16.

MISAPPROPRIATION—By trustee—Evidence—Statement of affairs in bankruptcy—Admissibility - - - **552**
See CRIMINAL LAW. 4.

MISCONDUCT — Receiving order — Scheme of arrangement — "Rash and hazardous speculation" - - - **457**
See BANKRUPTCY. 8.

MISDIRECTION—Refusal of new trial—Appeal to High Court - - - **350**
See COUNTY COURT. 4.

MISTAKE—Absence of—Compromise of action—Agreement to refer—Authority exceeded by counsel - - - - **838**
See PRACTICE. 6.

—— Notice—Validity of notice—Street—Paving
See LOCAL GOVERNMENT. 3. **794**

—— Ship—Bill of lading—Intentional letting in of sea-water—Negligent mistake **290**
See SHIPPING.

MISSTATEMENTS—In proposal made by agent of insurers without knowledge of insured—Authority of agent - - **516**
See INSURANCE, ACCIDENT.

MORTGAGE — Bill of sale — Mortgage or hire-purchase agreement - - **137**
See BILL OF SALE. 1.

—— Building agreement, Mortgage of—Chattels "to be deemed annexed to the freehold"
See BANKRUPTCY. 1. **713**

—— Chose in action—Notice—Priorities - **719**
See BANKRUPTCY. 2.

—— Estate duty—Property passing on death—Principal value - - - **429**
See REVENUE. 1.

MUNICIPAL CORPORATION.
See under CORPORATION.

NEGLIGENCE — *Liability — Intervening Act of Third Party—Effective Cause of Damage.*

The defendants' servants shunted some vehicles on to a siding which was on an incline running down to a level crossing over a highway. The siding had a catch-point which would have prevented the vehicles if set loose from running down the incline, but, for the convenience of their shunting operations, the defendants' servants did not place the vehicles beyond the

NEGLIGENCE—*continued.*
catch-point, but screwed down their brakes, and left them in a position in which they would not have caused any damage if not interfered with. Some boys, however, trespassing on the siding, unscrewed the brakes and detached a vehicle, which ran down the incline and injured the plaintiff, who was lawfully passing along the highway over the level crossing. The defendants were aware that boys were in the habit of trespassing on the siding and meddling with vehicles placed upon it:—
Held, that the defendants were liable for the damage sustained by the plaintiff, since they were aware of the danger of interference with the vehicles, and negligently omitted to take reasonable precautions to prevent the consequences of that interference. McDOWALL *v.* GREAT WESTERN RAILWAY COMPANY
Kennedy J. 618

—— False evidence, Action against witness for negligently giving—Criminal prosecution—Conviction unreversed
See CRIMINAL LAW. 2. 467

—— Ship—Bill of lading—Intentional letting in of sea-water—Negligent mistake 290
See SHIPPING.

NEGOTIATION—Promissory note—Inchoate instrument - - - - 361
See PROMISSORY NOTE.

NEW TRIAL—Refusal of—Appeal to High Court—Misdirection - - - 350
See COUNTY COURT. 4.

NEWSPAPER—Conspiracy—Publication of articles in newspaper—Perverting course of justice - - - - 77
See CRIMINAL LAW. 7.

NEWSPAPER STALL—Shop—Temporary newspaper stall at railway station—Notice of hours of employment of young persons
See SHOP. 286

NIGHT POACHING — Game — Previous convictions—Person "so offending" a third time - - - - - 199
See CRIMINAL LAW. 5.

NOTICE — Assignment — Attachment of debt — Balance in hands of garnishee - 527
See PRACTICE. 8.

—— Chose in action—Mortgage—Priorities 719
See BANKRUTCY. 2.

—— Landlord and tenant — Notice to quit, Validity of - - - - 157
See LANDLORD AND TENANT. 3.

—— Mistake in notice — Validity of notice — Street — Paving — "Back roads" — "Cross roads" - - - 794
See LOCAL GOVERNMENT. 3.

NUISANCE—Tramcars, Use of offensive language in—By-law—Validity - - 160
See TRAMWAY.

OFFENCES—Bankrupt—Prosecution—Filing of report of official receiver - - 107
See BANKRUPTCY. 5.

OFFENCES—*continued.*
—— Criminal law.
See Cases under CRIMINAL LAW.

—— Erection of premises in advance of building line—Liability of new owner - 646
See LOCAL GOVERNMENT. 2.

—— Selling by retail without licence—Club—Sale to agent of member - - 666
See LICENSING ACTS. 2.

OFFENCES AGAINST THE PERSON—Jurisdiction—Summary conviction on charge of assault — Question as to title to an interest in land - - - 637
See JUSTICES. 3.

OFFENSIVE LANGUAGE—Use of, in tramcars—By-law—Validity - - - 160
See TRAMWAY.

OFFICIAL REFEREE—Costs, Discretion as to—Leave to appeal - - - 643
See PRACTICE. 3.

ORDER AND DISPOSITION — Building agreement—Forfeiture of plant by builder after bankruptcy—Protected transaction
See BANKRUPTCY. 6. 555

OWNERSHIP — Reputed — Chattels "to be deemed annexed to the freehold" — Mortgage of building agreement 713
See BANKRUPTCY. 1.

PARLIAMENT — *Franchise — Disqualification—Maintenance of Voter's Wife in Pauper Lunatic Asylum—"Medical Assistance"—Medical Relief Disqualification Removal Act*, 1885 (48 & 49 *Vict. c.* 46), *s.* 2.
Where upon the revision of the lists of voters it appears that a voter or claimant has during the qualifying period received relief which is of the nature both of medical relief and ordinary relief, it is a question of fact for the revising barrister as to what was the real character of the relief and which kind of relief was merely incidental to the other.
The wife of a claimant had been removed as a dangerous lunatic to a pauper lunatic asylum, and had been detained there for two years at the expense of the ratepayers, no contribution towards her maintenance being made by her husband. The revising barrister held that the permanent maintenance of a lunatic was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and was not "medical assistance" within the meaning of the Medical Relief Disqualification Removal Act, 1885:—
Held, that the finding was one of fact that the relief, which had been in the first instance medical, had become ordinary relief, and that there was evidence to support the finding. KIRKHOUSE *v.* BLAKEWAY - - - Div. Ct. 306

2. —— *Registration — Borough Vote — Occupiers' List—Description of Nature of Qualification—Power of Revising Barrister to Amend—Effect of Declaration — Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26) *s.* 24.
Where a voter has made a declaration under s. 24 of the Parliamentary and Municipal Regis-

PARLIAMENT—*continued.*
tration Act, 1878, in order to correct an erroneous description of his qualification in the list, the revising barrister has power to make an amendment which would change the description of the qualification as it appears in the list. GOODRICH *v.* GREAT GRIMSBY (TOWN CLERK) Div. Ct. 301

—— Costs of local inquiry—Costs of parliamentary opposition - - - 601
See LOCAL GOVERNMENT. 4.

PATENT — Letters patent — Commissary and Vicar-General—Legality of reservation
See ECCLESIASTICAL LAW 816

PAUPER.
See under POOR LAW.

PAVING—Street—"Back roads"—Cross roads" Blackburn Improvement Act - 794
See LOCAL GOVERNMENT. 3.

PAY—"Annual pay"—Pension—Free rooms and fuel - - - - 629
See POLICE.

PAYMENT—Action on judgment—Part payment—Real property limitation - 676
See LIMITATIONS, STATUTE OF. 1.

PAYMENT INTO COURT—Denial of liability—Recovery of less than amount paid in—Costs of issues found for plaintiff
See PRACTICE. 4. 124

PENSION—"Annual pay"—Free rooms and fuel
See POLICE. 629

PETITION—Bankruptcy.
See under BANKRUPTCY.

POACHING—Game—Previous convictions—Person "so offending" a third time 199
See CRIMINAL LAW. 5.

POLICE—*Pension*—"*Annual Pay*"—*Free Rooms and Fuel*—*Police Act*, 1890 (53 & 54 *Vict. c.* 45), *Sched. I., rr.* 1, 11.

By the Police Act, 1890, a constable, after a certain number of years' approved service, is entitled to a pension, which is to be calculated on the amount of his "annual pay" at the date of his retirement.

A divisional inspector of police with his family resided free of rent at the police station, and had the free use of fuel, gas, and water:—

Held, that the value of the free residence and fuel, gas, and water was not part of his "pay" for the purpose of calculating his pension.

When a constable appeals to quarter sessions, under s. 11 of the Police Act, 1890, from the decision of the watch committee as to the amount of his pension, a case may be stated for the opinion of the King's Bench Division on a question of law. GOODWIN *v.* SHEFFIELD CORPORATION - - - - - Div. Ct. 629

POLICY.
See under INSURANCE, ACCIDENT AND INSURANCE, MARINE.

POOR LAW—*Pauper*—*Parish of Settlement*—*Addition to Area*—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act*, 1879 (42 & 43 *Vict. c.* 54).

By an order of the Local Government Board made under the provisions of the Divided Parishes and Poor Law Amendment Act, 1876, as amended and extended by the Poor Law Act, 1879, a portion of another parish was added to and amalgamated with a parish in which a pauper had previously acquired a settlement:—

Held, that the order did not operate to destroy the identity of the parish to which the portion of the other parish was added, and that the settlement of the pauper remained unaffected.

Judgment of the King's Bench Division, [1901] 1 K. B. 720, affirmed. WEST HAM UNION *v.* LONDON COUNTY COUNCIL - - C. A. 562

POOR-RATE—Appeal—Condition precedent 180
See RATES.

POWER OF APPOINTMENT — Stamp—Settlement—Exemption - - - 142
See REVENUE. 7.

—— Succession duty, Acceleration of—New title under appointment - - 388
See REVENUE. 8.

PRACTICE — *Appeal from Order of Judge at Chambers*—*Land injuriously affected by Railway*—*Compensation*—*Order for Trial in Superior Court*—*Appeal to Court of Appeal*—"*Practice and Procedure*"—*Regulation of Railways Acts*, 1868 (31 & 32 *Vict. c.* 119), *s.* 41—*Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An application to a judge in chambers, under the Regulation of Railways Act, 1868, s. 41, for an order that the question arising on a case of compensation under the Lands Clauses Consolidation Act, 1845, should be tried in the High Court, is not a matter of practice or procedure within the meaning of s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and an appeal from an order made on such an application lies to the Divisional Court. LONG *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY - - - - C. A. 813

2. —— *Costs*—*Action founded on Tort*—*Agreement for Lease of House*—*Removal of Fixtures*—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

By a written agreement the defendant agreed to grant and the plaintiff to take a lease of certain premises from a future date. After the agreement and before the date at which the lease was to commence, the defendant removed certain fixtures from the premises. The lease was executed and the plaintiff went into possession. He then discovered that the fixtures had been removed, and brought an action in the High Court against the defendant for wrongfully removing the fixtures, and obtained judgment for 20*l.* On appeal from an order affirming the taxation of the costs of the plaintiff on the county court scale:—

Held, that the action was founded on tort within the meaning of s. 116 of the County Courts Act, 1888, and that the plaintiff was entitled to costs on the High Court scale. SACHS *v.* HENDERSON - - - - - C. A. 612

3. —— *Costs*—*Appeal*—*Official Referee*—*Discretion as to Costs*—*Leave to Appeal*—*Judicature*

Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Order* XXXVI., *r.* 55 (*b*); *Order* LXV., *r.* 1.

Where the whole of an action is referred by order of Court to an official referee, without any direction as to costs in the order, his decision as to costs cannot be appealed against except by his leave. MINISTER & Co. *v.* APPERLY Div. Ct. 643

4. —— *Costs—Payment into Court with Denial of Liability—Recovery of less than Amount paid in—Costs of Issues found for Plaintiff—Rules of Supreme Court, Order* XXII., *rr.* 1, 6.

In an action to recover damages for injuries arising from the negligence of the defendants, they denied the negligence and paid a sum of money into court with a denial of liability. The plaintiffs did not accept the money paid into court in satisfaction of their claim, and the action went to trial and resulted in a verdict for a less amount. The judge who tried the case ordered judgment to be entered for the defendants with the general costs of the action, and that the plaintiffs should have the costs of the issue found in their favour:—

Held, that the questions, raised by the pleadings, whether the defendants had been guilty of negligence, and, if so, whether the money paid into court was sufficient, were distinct issues, and that the plaintiffs were entitled to their costs on the issue of negligence on which they had succeeded. WAGSTAFFE *v.* BENTLEY - C. A. 124

5. —— *Costs—Trespass—Claim for Damages and Injunction—Judgment for Nominal Damages and Injunction—"Action founded on Tort"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116, *sub-s.* 2.

An action, claiming damages for trespass to land and an injunction, was transferred under s. 69 of the County Courts Act, 1888, from the Chancery Division of the High Court to a county court. The action resulted in a verdict for the defendant, for whom judgment was entered. On appeal a Divisional Court directed that judgment should be entered for the plaintiff for nominal damages and an injunction, but without costs, on the ground that the plaintiff had recovered less than 10*l.* in an action founded on tort, and was disentitled, under s. 116, sub-s. 2, of the Act, to the costs of the action. On appeal:—

Held, that an action which, though nominally brought to recover damages for a tort, includes a claim for an injunction as the main part of the relief sought, is not an action founded on tort within the sub-section, and that the plaintiff was entitled to the costs of the action.

St. John's College, Cambridge v. *Pierrepont*, (1891) 61 L. J. (Q.B.) 19, overruled. KEATES *v.* WOODWARD - - - - C. A. 532

6. —— *Counsel's Authority—Compromise of Action—Agreement to Refer—Authority exceeded by Counsel—Limitation of Counsel's Authority unknown to other Side—Interlocutory Order—Absence of Mistake.*

The plaintiff in an action for slander authorized her counsel to agree to a reference of the action, but only on condition that the defendant made a statement disclaiming all imputations upon the plaintiff's character. This limitation

of the ostensible authority of the plaintiff's counsel was not communicated to the other side. The plaintiff's counsel agreed to a reference of the action without any statement disclaiming imputations by the defendant, and, when the case was called on for trial, an order for a reference was accordingly made. In assenting to the reference, plaintiff's counsel acted under no mistake or misapprehension as to the extent of the authority actually given to him:—

Held, reversing the decision of the Lord Chief Justice, that in such a case the same principle applied to a compromise of an action resulting in an interlocutory order as would apply to a compromise which resulted in a final order; and that, the limitation of counsel's ostensible authority having been unknown to the other side, the mere fact that the plaintiff's counsel had, in agreeing to the reference, exceeded the authority actually given to him did not, in the absence of mistake or anything analogous thereto, afford any ground for setting aside the order of reference. NEALE *v.* LADY GORDON LENNOX C. A. 838

7. —— *Discovery—Interrogatories—Defamation—Slander—Malice—Privilege—Inquiry as to Information inducing Belief of Defendant in Truth of Words spoken—Inquiry as to Steps taken by Defendant to ascertain Truth.*

In an action for slander in imputing to the plaintiff that, being a member of a metropolitan borough council, he had accepted a bribe in connection with a matter that came before the council for decision, the defendant, who was also a member of the council, pleaded that the words were spoken, if at all, in good faith, without malice towards the plaintiff, and in the discharge of his duty as councillor, and on an occasion which was privileged. The plaintiff applied for leave to administer to the defendant an interrogatory asking what information the defendant had which induced him to believe that the words spoken by him were true, and what steps he had taken before speaking the words to ascertain whether they were true. On appeal from an order disallowing the interrogatory:—

Held, that the interrogatory should be allowed as being relevant to the issue of malice raised by the pleadings and directed to support the plaintiff's case. ELLIOTT *v.* GARRETT - C. A. 870

8. —— *Garnishee Summons—Attachment of Debt—Payment into Court of Amount in Garnishee Order—Balance in Hands of Garnishee—Assignment—Effect of Notice of Assignment.*

Money in the hands of the defendant was attached under a garnishee order to satisfy a judgment debt. The judgment debtor assigned to the plaintiff the balance of the amount in the hands of the defendant, and notice was given of the assignment. Subsequently a garnishee order was served on the defendant with respect to another judgment debt. The defendant thereupon paid the amount of the first judgment debt into court, and the balance of the money in his hands he paid into court under the second garnishee order. In an action by the plaintiff to recover the amount of the balance:—

Held, that, when the first garnishee order had

PRACTICE—*continued.*
been satisfied by payment into court, the assignment took effect as to the balance in the hands of the defendant, that the money should have been paid to the plaintiff, and that he was entitled to recover the amount.

Judgment of the Divisional Court, [1901] 1 K. B. 102, reversed. YATES *v.* TERRY **C. A. 527**

9. —— *Service of Writ within the Jurisdiction —Foreign Corporation—Foreign Company carrying on Business temporarily in England—"Stand" —Rules of Supreme Court, Order* IX., *r.* 8 — *Order* LXX., *r.* 3.

The defendants, a foreign corporation, who were manufacturers of motor-cars abroad, hired a "stand" at the Crystal Palace for the exhibition of articles of their manufacture at a cycle show, and exhibited at the show, which lasted for nine days, among other articles, a motor-car fitted with tyres, which were alleged by the plaintiffs to be an infringement of their patent. The defendants' "stand" was in charge of a person employed by them as their representative, whose duty it was to explain the working of the articles exhibited, and to take orders for and press the sale of the defendants' goods:—

Held, that, during the continuance of the show, the defendants were carrying on business so as to be resident at a place within the jurisdiction, and therefore could be served there with a writ in an action by the plaintiffs for infringement of their patent under Order IX., r. 8. DUNLOP PNEUMATIC TYRE COMPANY *v.* ACTIEN-GESELLSCHAFT FÜR MOTOR UND MOTORFAHRZEUGBAU VORM. CUDELL & CO. - **C. A. 342**

—— Stay of proceedings—Step in proceedings
See ARBITRATION. **480**

10. —— *Writ for Service out of the Jurisdiction—Breach of Contract, whether within or out of the Jurisdiction — Wrongful dismissal — Letter written Abroad—Rules of Supreme Court, Order* XI., *r.* 1 (*e*).

The plaintiff was employed by the defendant, a foreigner resident abroad, as the London correspondent of a newspaper, of which the defendant was the proprietor. The defendant gave notice of dismissal to the plaintiff by a letter written and posted abroad to the plaintiff in this country. In an action for wrongful dismissal by the plaintiff against the defendant, leave had been given to issue a writ of which notice was to be served on the defendant out of the jurisdiction, and notice of the writ had been accordingly served upon him abroad:—

Held, that, the alleged breach of contract having taken place out of the jurisdiction, the case did not fall within Order XI., r. 1 (*e*), and therefore the writ and service must be set aside. HOLLAND *v.* BENNETT - - - **C. A. 867**

—— Appeal to High Court—Order under s. 5 of Workmen's Compensation Act, 1897
See COUNTY COURT. 2. **880**

—— Costs—Power to order successful defendant to pay costs - - - - **625**
See COUNTY COURT. 3.

—— Misdirection—Refusal of new trial—Appeal to High Court - - - **350**
See COUNTY COURT. 4.

PRACTICE—*continued.*
—— Service of summons on limited company—Sale of Food and Drugs Acts - **91**
See COMPANY.

PRESCRIPTION—Ancient lights—Purposes requiring special quantity of light — Measure of right - - - - **15**
See LIGHT.

PRESUMPTION — Drain—Water flowing from highway—Presumption of legal origin
See HIGHWAY. . **690**

PREVENTION OF CRIMES—Proof of previous convictions - - - - **547**
See CRIMINAL LAW. 1.

PRINCIPAL AND AGENT—*Agreement by Agent not to interfere with Business after ceasing to be employed — Liquidated Damages —Injunction — Election.*

An assurance company appointed an agent, and by the terms of the agreement between them it was provided that in the event of the agent ceasing to act for the company he should not give information as to the company's connections, or interfere directly or indirectly with their business, or represent any other company doing similar business, within a radius of fifty miles from the headquarters of his agency for one year from the date of his ceasing to act, and that in case of breach he should pay the company 100*l.* as ascertained and liquidated damages:—

Held, that the company could not, upon the agent's breach of agreement, claim an injunction as well as the 100*l.* liquidated damages, but must elect between the two remedies. GENERAL ACCIDENT ASSURANCE CORPORATION *v.* NOEL **Wright J. 377**

—— Insurance—Misstatements in proposal made by agent of insurers without knowledge of insured—Authority of agent - **516**
See INSURANCE, ACCIDENT.

PRIORITY — Chose in action — Mortgage — Notice - - - - **719**
See BANKRUPTCY. 2.

PRIVILEGE — Discovery—Interrogatories—Defamation - - - - **870**
See PRACTICE. 7.

PROHIBITION — Consistory Court—Patent of Commissary and Vicar-General — Legality of reservation - - **816**
See ECCLESIASTICAL LAW.

PROMISSORY NOTE—*Inchoate Instrument—Negotiation—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), s. 20.

The defendant, having agreed to borrow the sum of 15*l.* from A., signed and handed to A. a blank stamped paper which he authorized A. to fill up as a promissory note payable to A. and for the sum of 15*l.* only. The stamp upon the paper, however, was sufficient to cover a sum of 30*l.* A., in breach of his authority, fraudulently filled up the paper as a promissory note for 30*l.* and payable to the plaintiff; and he handed it to the plaintiff, who gave value for it without notice of A.'s breach of authority. A. misappropriated the proceeds. In an action by the plaintiff on the promissory note:—

Held, that the delivery of the note by A. to

PROMISSORY NOTE—*continued.*
the plaintiff was not a negotiation of the note within the meaning of the proviso to s. 20, sub-s. 2, of the Bills of Exchange Act, 1882, so as to entitle the plaintiff to recover.
Quære, whether the payee of a note can under any circumstances be a holder of it in due course. HERDMAN *v.* WHEELER - - Div. Ct. 361

PROOF—Burden of—Lien passing to trustee in bankruptcy - - - - 1
See BANKRUPTCY. 3.

PROSECUTION—Offences by bankrupt—Filing of report of official receiver - 107
See BANKRUPTCY. 5.

PUBLIC HEALTH—Costs of local inquiry—Costs of parliamentary opposition - 601
See LOCAL GOVERNMENT. 4.

PUBLIC HEALTH (BUILDINGS IN STREETS)—Offences—Liability of new owner—Continuance in same state after written notice - - - - 646
See LOCAL GOVERNMENT. 2.

PUBLIC HOUSE—Licensed person—Executor of deceased licensee - - 94
See LICENSING ACTS. 1.

—— Right of Licence-holders to request person to leave licensed premises - 296
See LICENSING ACTS. 3.

PUBLIC MEETINGS—Recognizances to be of good behaviour—Jurisdiction - 167
See JUSTICES. 2.

PUBLICATION—Newspaper—Perverting course of justice - - - - 77
See CRIMINAL LAW. 7.

QUALIFICATION—Description of nature of qualification—Power of revising barrister to amend - - - 301
See PARLIAMENT. 2.

QUIT—Validity of notice to quit - - 157
See LANDLORD AND TENANT. 3.

RAILWAY—*Adjoining Owner—Private Branch Railways—Private Sidings—Openings for Communication with Railway—Right to Require Openings—Limitations on Right—Railway Regulation Act*, 1842 (5 & 6 *Vict. c.* 55), *s.* 12—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 76.
Sect. 76 of the Railways Clauses Consolidation Act, 1845, under which owners or occupiers of land adjoining a railway may make private branch railways communicating with the railway, and require the railway company to make openings in their rails, and such additional lines of rails as may be necessary for effecting communication, is applicable only to communications required by the owners of the branch railways for the purpose of using the railway with their own engines and carriages, and does not entitle an adjoining owner, who makes a siding, to demand communication with the railway for the purpose of establishing a claim to facilities for his traffic:—
Held, also, that the limitation of the right of

RAILWAY—*continued.*
communication, between a railway and a private branch railway, to places where the communication can be made with safety to the public, and without injury to the railway and without inconvenience to the traffic thereon, does not relate solely to the structural difficulties of making an opening, but has reference also to difficulties arising from working the traffic on the railway.
Decision of the Railway Commissioners, [1902] 1 K. B. 381, reversed. LANCASHIRE BRICK AND TERRA COTTA COMPANY *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - C. A. 651

2. —— *Dock Company—Lines within Area of Dock Estate—Continuous Line of Railway Communication—Through Rates—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 25—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 3.
A dock company, constituted under Acts of Parliament, had, in pursuance of provisions in their Acts, laid down within their docks lines of rails and sidings, connected with the line of a railway company, for the purpose of the carriage of goods in the trucks and wagons of the railway company from and to the system of the railway company to and from the quays and warehouses in the docks. The Acts of the dock company did not, in respect of these lines and sidings, incorporate the provisions of the Railways Clauses Consolidation Acts or contain any of the usual statutory provisions with regard to railways. The dock company applied to have through rates fixed by the Railway Commissioners in respect of traffic from the quays and warehouses in their docks to certain places on the railway company's system under s. 25 of the Railway and Canal Traffic Act, 1888, which provides, in substance, that the Railway and Canal Traffic Act, 1854, in cases where a railway forms part of a continuous line of railway communication, shall include the due and reasonable receiving, forwarding, and delivering by every railway company, "at the request of any other such company," of through traffic to and from the railway of any other such company at through rates:—
Held, reversing the decision of a majority of the Railway Commissioners, that, under the provisions of their Acts, the applicants were not a "railway company" in respect of the before-mentioned lines and sidings, and that those lines and sidings were not a "railway," and did not form part of a "continuous line of railway communication," within the meaning of the Railway and Canal Traffic Act, 1888, and therefore the applicants were not entitled to through rates under s. 25 of that Act. LONDON AND INDIA DOCKS COMPANY *v.* GREAT EASTERN RAILWAY COMPANY AND MIDLAND RAILWAY COMPANY - C. A. 568

—— Compensation—Appeal from order of judge at chambers—"Practice and procedure" *See* PRACTICE. 1. 813

—— Shop—Temporary newspaper stall at railway station—Notice of hours of employment of young persons - - 286
See SHOP.

—— Street—Paving—"Back roads"—"Cross roads"—Summary jurisdiction - 794
See LOCAL GOVERNMENT. 3.

RATES—*Appeal—Assessment Committee—Failure to obtain Relief on Objection to Valuation List—Appeal against Subsequent Rates—Condition Precedent—Poor-rate—Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

Where a person rated to the relief of the poor in a country parish has objected, under s. 1 of the Union Assessment Committee Amendment Act, 1864, before the assessment committee of the union to his assessment in the valuation list in force for the parish; and, having failed to obtain the relief he asks for, has appealed to sessions against the then current poor-rate made in conformity with the valuation list, it is a condition precedent to his right to appeal against a subsequent rate made in conformity with the same list that he should again have given the notice of his objection to the valuation list required by s. 1, and have failed to obtain relief from the assessment committee.

Reg. v. *Great Western Ry. Co.*, (1869) L. R. 4 Q. B. 323, followed.

Reg. v. *Justices of Denbighshire*, (1885) 15 Q. B. D. 451, distinguished. THE KING *v.* ESSEX JUSTICES - - - - **Div. Ct. 180**

—— Dock company—Continuous line of railway communication—Through rates - **568**
See RAILWAY. 2.

—— Partial exemption of land covered with water in Woolwich—Appeal - **750**
See LONDON. 3.

REAL PROPERTY LIMITATION.
See Cases under LIMITATIONS, STATUTE OF.

RECEIPT—Of money beyond the United Kingdom—House used for betting - **353**
See GAMING.

RECEIVING ORDER—Scheme of arrangement—Creditor—Withdrawal of debt - **457**
See BANKRUPTCY. 8.

RECOGNIZANCES—To be of good behaviour—Jurisdiction—Public meetings—Use of insulting language - - - **167**
See JUSTICES. 2.

REDEMPTION—Land tax—Annual sum payable by way of interest—Charge on premises
See LIMITATIONS, STATUTE OF. 2. **682**

REFEREE—Official—Discretion as to costs—Leave to appeal - - - **643**
See PRACTICE. 3.

REGISTRAR—Solicitor—Annual certificate—Duty of registrar—Discretion - **128**
See SOLICITOR.

REGISTRATION—Occupiers' list—Qualification—Power of revising barrister to amend
See PARLIAMENT. 2. **301**

RENEWAL—Lease—Renewal "at costs of lessee"—Costs of reference and award as to amount of fine payable on renewal
See LANDLORD AND TENANT. 2. **512**

RENT—Lease—Liability of assignee for rent due before adjudication of bankruptcy **595**
See BANKRUPTCY. 4.

REPORT—Offences by bankrupt—Prosecution—Filing of report of official receiver **107**
See BANKRUPTCY. 5.

REPUTED OWNERSHIP—Mortgagee empowered to take possession if builder should "become bankrupt" - - **713**
See BANKRUPTCY. 1.

RES JUDICATA—Decision that street is a highway - - - - - **188**
See ESTOPPEL.

RESIDUE—Settlement estate duty—Property settled by will—Amount set apart to pay annuities - - - **113**
See REVENUE. 3.

RETAINER—Of solicitors by resolutions not under seal—Subsequent affixing of seal after work partly done under retainer
See LOCAL GOVERNMENT. 4. **601**

REVENUE—*Estate Duty—Property passing on Death—Principal Value—Mortgage in Fee by Tenant for Life and Remaindermen—Tenant for Life indemnified against Mortgage Debt and Interest—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*b*), 7 *sub-s.* 7.

In May, 1888, the Ditton estate stood limited to the Duchess of Buccleuch for life, and after her death to such uses as Lord Montagu and his eldest son should jointly appoint, and in default of and subject to such appointment to Lord Montagu for life, with remainder to his eldest son for an estate of freehold. By deed of May 29, 1888, the Duchess, Lord Montagu, and his eldest son concurred in granting and appointing the fee by way of mortgage to secure 27,000*l.* with interest, advanced by the mortgagees to Lord Montagu and his eldest son, who alone covenanted to repay the principal and interest and had power to redeem. By a further deed of the same date Lord Montagu and his eldest son covenanted to indemnify and keep indemnified the Duchess during her lifetime against the mortgage debt and interest, and all claims and demands in respect thereof against her or the Ditton estate, and they conveyed and assigned to trustees, upon trust to effectuate the like indemnity, a yearly sum of 1500*l.*, payable out of other estates in which they had sufficient interest. The Duchess was, and the Ditton estate was, during her lifetime, in fact kept wholly indemnified by them against the mortgage, and all claims and demands for interest or otherwise in respect thereof. She died on March 28, 1895:—

Held, that on her death estate duty was payable by Lord Montagu, under the Finance Act, 1894, upon the principal value of the Ditton estate without deducting the mortgage debt. ATTORNEY-GENERAL *v.* LORD MONTAGU **Phillimore J. 429**

2. —— *Estate Duty—Succession Duty—Gift to a Charitable Society—Reservation of an Annuity to the Donor—Bonâ fide Purchase—Partial Consideration—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 3, *sub-s.* 2—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 7.

In 1889 the directors of an unincorporated charitable society received from B. 500*l.* in lieu

REVENUE—*continued.*

of a legacy to the society, and agreed to pay to B. for his life, and to his wife if she survived him, an annuity of 25*l.* The annuity was not charged upon or secured by the property of the society, and was paid by the directors as one of the ordinary outgoings of the society. The commercial value of the annuity was 210*l.* B. and his wife, who survived him, died after the date of the Finance Act, 1894. The Crown claimed that on the death of B. estate duty became payable by the society on the 500*l.* under s. 2, sub-s. 1 (*c*), of the Act; and that on the death of the wife succession duty became payable on the 500*l.* under s. 7 of the Succession Duty Act, 1853:—

Held, that estate duty was payable, but that under s. 3, sub-s. 2, of the Finance Act, 1894, the value of the consideration for the annuity, namely, 210*l.*, must be deducted from the value of the property for the purpose of estate duty, and that the duty was, therefore, only payable on 290*l.*

Held, also, that no succession duty was payable, the transaction being a bonâ fide sale, and, therefore, not within s. 7 of the Succession Duty Act, 1853. ATTORNEY-GENERAL *v.* JOHNSON
Phillimore J. 416

3. —— *Settlement Estate Duty — Property settled by Will—Amount set apart to pay Annuities—Bequest of Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1; *s.* 22—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1.

A testator by his will devised and bequeathed all his real and personal estate to trustees on trust for conversion into money, and out of the moneys so produced to pay his funeral and testamentary expenses, and debts, and certain pecuniary legacies given by the will, and to set aside a sufficient amount of the residuary estate upon trust to pay annuities for life to certain persons, and, subject to that provision, to divide the residuary estate in certain proportions among residuary legatees. The trustees did, in pursuance of the testator's directions, set aside out of the residuary estate a certain amount, which they invested so as to produce an income sufficient to pay the annuities:—

Held, that the fund so set aside was property settled by the testator's will within the meaning of the Finance Act, 1894, s. 5, sub-s. 1, and therefore settlement estate duty was payable upon it. *In re* CAMPBELL - - C. A. 113

4. —— *Stamp Duty — Lease — Tramways — Repair of Road—Payment by Lessees in lieu of Repair — Purchase of Electrical Energy from Lessors — "Lease" — "Bond or Covenant" — "Covenant relating to the Matter of the Lease"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 4; *s.* 77, *sub-s.* 2, *and Schedule, Title "Bond."*

By a lease of tramways to a traction company by a municipal corporation, made pursuant to the Tramways Act, 1870, the company were to pay rent at a fixed rate per cent. on the cost of the original purchase. They were also to pay to the lessors a given sum per mile of road along which the tramways were laid, in lieu of repairing any portion of such road, and maintaining the tramways, except the rails and electric-bonds laid

REVENUE—*continued.*

thereon. The minimum amount payable under this clause was 900*l.* per annum, and a power of distress was reserved in respect of it. They were also bound to purchase from the vendors all electrical energy required for the purpose of the tramways, and to pay for the same at a given rate, the minimum sum payable in any one year being 4000*l.* On a case stated:—

Held, that the 900*l.* payable in respect of the repair of the road was rent, and that ad valorem duty was payable upon it under s. 4 of the Stamp Act, 1891:

Held, also, that the 4000*l.* payable in respect of the supply of electrical energy was not rent, but that it was payable under a covenant made in further consideration for the lease, and relating to the matter of the lease, within s. 77, sub-s. 2, of the Stamp Act, 1891, and that the instrument was not chargeable with ad valorem duty in respect of it. BRITISH ELECTRIC TRACTION COMPANY *v.* INLAND REVENUE COMMISSIONERS - - - - C. A. 441

5. —— *Stamp Duty — Local Authority — "Issue" of Loan Capital—Date of Issue—Finance Act*, 1899 (62 & 63 *Vict. c.* 9), *s.* 8, *sub-ss.* 1, 2.

By s. 8, sub-ss. 1 and 2, of the Finance Act, 1899, where any corporation propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners a statement of the amount proposed to be secured by the issue, charged with an ad valorem stamp duty.

A corporation proposing to issue loan capital by the creation of corporation stock invited tenders on the terms that the stock was to be paid for by the allottees by instalments, the last of which became due on June 21, 1899, after which date the stock was to be inscribed. The stock was applied for and allotted, and prior to June 20, 1899, scrip certificates were delivered to the allottees which entitled the holders, on payment of the remaining instalments, to have stock inscribed in their names.

The Finance Act, 1899, came into force on June 20, 1899.

Held, that there had been an "issue" of the loan capital at the latest by the date when the scrip certificates were delivered, and, that date being prior to the coming into force of the Act, the duty imposed by s. 8 was not payable. ATTORNEY-GENERAL *v.* LIVERPOOL CORPORATION
Phillimore J. 411

6. —— *Stamp Duty — Property Purchased under Statutory Power—Production of Instrument of Conveyance — Duty on Transfer of Personal Property—Finance Act*, 1895 (58 & 59 *Vict. c.* 16), *s.* 12.

Sect. 12 of the Finance Act, 1895, provides that, where by virtue of any Act any person is authorized to purchase property, he shall, within a specified time, produce to the Commissioners of Inland Revenue an instrument of conveyance of the property duly stamped with the ad valorem duty payable upon a conveyance on sale of the property:—

Held, that s. 12 applies to personal as well as real property; so that, where goods and chattels were included in property purchased under statutory authority, an instrument of conveyance must

REVENUE—*continued.*
be produced stamped with the ad valorem duty in respect of the whole of the property so purchased.

Decision of the Divisional Court, [1901] 2 K. B. 773, affirmed. ATTORNEY-GENERAL *v.* EASTBOURNE CORPORATION - - **C. A. 403**

7. —— *Stamp Duty — Settlement — Power of Appointment — Exemption — Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 106, *Sched. I.*

By a settlement funds were to be held by trustees on certain specified trusts for the benefit of the settlor's children. The settlement contained a provision that the trustees might at the request of any of the children revoke the trusts concerning that child's settled share, and resettle that share for the benefit of a certain specified class of persons. Ad valorem duty was paid on that settlement under the Stamp Act, 1891, Sched. I., head "Settlement." Subsequently, at the request of the appellant, who was one of the children, and in contemplation of his marriage, the trustees by deed revoked the trusts of the original settlement concerning his share, and declared that during his life it should be held on trust to pay the income to him, and on his death should be transferred to the trustees of his marriage settlement, which was of even date, upon the trusts declared concerning the same in that settlement. By the marriage settlement, to which the trustees of the original settlement were not parties, the appellant's share was settled on trusts which were within the power of resettlement given to the trustees under the original settlement:—

Held, that the case was not one in which several instruments were executed for effecting a settlement of the same property within s. 106 of the Stamp Act, 1891; and that the marriage settlement was within the Stamp Act, 1891, Sched. I., head "Settlement," and not within the exemption therein of an "instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment," and that it was, therefore, liable to ad valorem stamp duty.

Judgment of a Divisional Court (Kennedy and Phillimore JJ.), [1901] 2 K. B. 342, affirmed RUSSELL *v.* INLAND REVENUE COMMISSIONERS **C. A. 142**

8. —— *Succession Duty — Settlement—Power to appoint Settled Estate—Exercise of Power—Interest of Appointee under Settlement—New Title under Appointment—Acceleration of Succession—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

By a settlement made by a father on the marriage of his son, who was a party to the deed, an estate was conveyed by the father to trustees to such uses as the father and son should by deed jointly appoint, and in default of and until such appointment to the use of the father for life, and after his decease to the son in fee simple in case he should survive his father; but if he died in the lifetime of his father leaving a son who should attain the age of twenty-one years, then to the use of that son, and, if there was no such son who attained the age of twenty-one years, then to the settlor in fee simple. By a subsequent deed the settlor and his son, in exercise of the

REVENUE—*continued.*
power of appointment in the settlement, jointly appointed the estate to the son in fee. On an information claiming succession duty:—

Held, that the son took the estate by a new title under the deed of appointment, and not by a succession the title to which had been accelerated by the surrender or extinction of any prior interest within the meaning of s. 15 of the Succession Duty Act, 1853, and that succession duty was not payable. ATTORNEY-GENERAL *v.* EARL OF SELBORNE - - - **C. A. 388**

REVENUE—Cheque—Draft by one branch of bank on another—Bill of exchange **242**
See BANKER.

REVISING BARRISTER—Power of, to amend description of nature of qualification **301**
See PARLIAMENT. 2.

ROADS.
See STREETS.

RULES OF SUPREME COURT—Order IX., r. 8—*Service of Writ of Summons* - **342**
See PRACTICE. 9.

—— Order XI., r. 1 (*e*)—*Service out of the Jurisdiction* - - - - **867**
See PRACTICE. 10.

—— Order XXII., rr. 1, 6—*Payment into and out of Court and Tender* - - **124**
See PRACTICE. 4.

—— Order XXX., rr. 1, 2—*Summons for Directions* - - - - - **480**
See ARBITRATION.

—— Order XXXVI., r. 55 (*b*)—*Trial* - **643**
See PRACTICE. 3.

—— Order LIX., rr. 10–17—*Divisional Courts*
See INFERIOR COURT. **721**

—— Order LXV., r. 1—*Costs* - - **643**
See PRACTICE. 3.

—— Order LXX., r. 3—*Effect of Non-compliance*
See PRACTICE. 9. **342**

SALE—Bread—Sale otherwise than by weight
See BREAD. **670**

—— Food and Drugs.
See Cases under ADULTERATION.

—— Food and drugs—Practice—Service of summons on limited company - - **91**
See COMPANY.

"SCAFFOLDING"—Workmen's compensation
See EMPLOYER AND WORKMAN. 9. **494**

SCHEME OF ARRANGEMENT—Receiving order—Creditor—Withdrawal of debt **457**
See BANKRUPTCY. 8.

SEAL—Retainer of solicitors by resolutions not under seal—Subsequent affixing of seal after work partly done under retainer
See LOCAL GOVERNMENT. 4. **601**

SERVANT—Master and.
See Cases under EMPLOYER AND WORKMAN.

SERVICE—Company, Summons on—Sale of Food and Drugs Acts - - - **91**
See COMPANY.

SERVICE—*continued.*

—— Of writ within the jurisdiction—Foreign company carrying on business temporarily in England - - 342
See PRACTICE. 9.

—— Out of the jurisdiction—Writ—Breach of contract - - - - 867
See PRACTICE. 10.

SETTLED LAND—Estate duty—Mortgage—Property passing on death—Principal value - - - - 429
See REVENUE. 1.

—— Settlement estate duty—Property settled by will—Amount set apart to pay annuities—Residue - - - - 113
See REVENUE. 3.

—— Succession duty—New title under appointment—Acceleration of succession 388
See REVENUE. 8.

SETTLEMENT—Estate duty—Property settled by will—Amount set apart to pay annuities—Residue - - 113
See REVENUE. 3.

—— Pauper—Parish of settlement—Addition to area - - - - - 562
See POOR LAW.

—— Stamp—Power of appointment—Exemption
See REVENUE. 7. 142

—— Succession duty, Acceleration of—New title under appointment - - 388
See REVENUE. 8.

SEWER—Recovery of expenses—Highway within two jurisdictions—New street
See LONDON. 2. 336

SHIPPING—*Bill of Lading—Exceptions—Peril of the Seas occasioned by Negligence—Intentional letting in of Sea-water—Negligent Mistake.*

Goods were shipped under a bill of lading which excepted loss or damage arising from peril of the seas or navigation, whether arising from the negligence, default, or error in judgment of the engineers or otherwise howsoever. When the ship was off the port of discharge the engineer, intending to fill the ballast tank with water for boiler use whilst discharging, opened the sea-cock, and then by mistake opened the valve of the tank in which the goods were being carried instead of the valve of the ballast tank, and the goods were damaged by sea-water:—

Held, that the damage was caused by a peril of the seas arising from negligence of the engineer, within the exception, and that the shipowner was not liable. BLACKBURN *v.* LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY - - - Walton J. 290

—— Dock, Ship loading in—Workmen's Compensation Act - - 204, 225
See EMPLOYER AND WORKMAN. 12, 13.

SHOP—*Temporary Newspaper Stall at Railway Station—Notice of Hours of Employment of Young Persons—Shop Hours Act*, 1892 (55 & 56 *Vict. c.* 62), *ss.* 4, 9.

By the Shop Hours Act, 1892, s. 4, "In every shop in which a young person is employed a notice shall be kept exhibited by the employer in a conspicuous place referring to the provisions of this Act and stating the number of hours in the week during which a young person may lawfully be employed in that shop." By s. 9, "In this Act, unless the context otherwise requires, 'shop' means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire. . . ."

A firm of newsagents employed a boy at their bookstall at a railway station, upon which stall the notice required by s. 4 was duly exhibited. For a portion of the morning the boy was employed in delivering newspapers in a village about two miles distant, and in selling newspapers on the platform of the village station from a temporary structure put up each morning by himself and consisting of a board lying on trestles; upon this structure no notice under s. 4 was exhibited:—

Held, that the board and trestles were not a shop within the meaning of s. 4 of the Act, and that the employment of the boy was at the bookstall of the principal station, where a notice was exhibited:—

Semble, that a stall composed of a board and trestles would be a shop within the meaning of s. 3 of the Act, which limits the hours of employment of young persons in or about shops. W. H. SMITH & SON *v.* KYLE - Div. Ct. 286

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SOLICITOR—*Annual Certificate—Registrar of Solicitors—Duty of Registrar—Discretion—Practice—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 23, 24.

Under s. 23 of the Solicitors Act, 1843, the registrar of solicitors has no discretion to refuse the certificate therein mentioned to an applicant who has complied with the requirements of the section, except in a case where he has reason to believe that the applicant for the certificate is not on the rolls; and the discretion of a judge on application to him under s. 24 of the Act by way of appeal from the refusal of a certificate by the registrar is similarly limited.

Observations in *Re An Application under the Solicitors Act*, 1843, (1899) 80 L. T. 720, disapproved of. *In re* A SOLICITOR - C. A. 128

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TRAMWAY—*By-law—Validity—Use of Offensive Language in Tramcars—By-laws for Prevention of Nuisances—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 46.

The Tramways Act, 1870, s. 46, enables the promoters of any tramway to make by-laws for the prevention of nuisances in any carriage belonging to them. The promoters of a tramway made a by-law providing: "No person shall swear or use offensive or obscene language whilst in or upon any carriage":—

Held, that the by-law was valid although it did not contain any such additional words as "so as to be a nuisance or annoyance to others."
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A vaccination officer by virtue of his appointment, without directions, general or special, from the guardians, and notwithstanding the guardians' directions not to prosecute, may institute proceedings for the enforcement of the law against a parent who is in default in respect to the vaccination of his child.

In such proceedings it is not a condition precedent that proof should be given by the vaccination officer of the visit of the public vaccinator to the home of the child after twenty-four hours' notice to the parent, as required by s. 1, sub-s. 3, of the Vaccination Act, 1898. MOORE *v.* KEYTE.
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WATER—*Supply—Waterworks Company—Special Act—"Domestic purposes"—Purposes of "Trade, Manufacture, or Business"—Boarding-house Keeper.*

A waterworks company's special Act provided that they should, at the request of occupiers of houses, furnish them with a supply of water for "domestic purposes" at specified rates; that a supply for domestic purposes should not include a supply for any "trade, manufacture or business," and that it should be lawful for the company to supply any person with water for other than domestic purposes upon such terms and conditions as should be agreed upon between them.

The occupier of a dwelling-house carried on the business of a boarding-house keeper therein, receiving persons to board and lodge who used the water of the company. Water was only used in the house for cleansing, cooking, drinking, and sanitary purposes:—

Held, that, having regard to the use of the water in the house, the occupier was entitled to demand a supply of water at the rates specified in the Act for a supply for "domestic purposes." PIDGEON *v.* GREAT YARMOUTH WATERWORKS COMPANY - - - - - Div. Ct. 310

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